No. 18-___

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tennessee Wine and Spirits Retailers Association. Petitioner is not the subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation owns 10% or more of Petitioner's stock.

Respondents are Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More; and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits.

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INTRODUCTION

The Twenty-first Amendment grants States "virtually complete control" over the intrastate distribution and sale of liquor. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Like nearly all States, Tennessee has exercised that authority to create a three-tier distribution system that separately regulates (1) producers of liquor, (2) wholesalers that act as middlemen, and (3) retailers that sell directly to consumers. As part of this regime, Tennessee imposes durational-residency requirements for retail liquor licenses. Tennessee law requires individuals to reside in Tennessee for two years before they are eligible for a license to sell liquor to consumers; the same requirements apply to the directors, officers, and capital stockholders of corporate applicants. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A). Tennessee is not alone: At least twenty-one States impose some form of durational-residency requirement for liquor retailers or wholesalers. And many States impose other residency-based requirements on those entities.

These laws make good sense. As Judge Sutton recognized below, States have a core Twenty-first Amendment interest in "[p]romoting responsible consumption and orderly liquor markets," through close regulation of liquor retailers and wholesalers. Pet.App. 50a (Sutton, J., dissenting). And retailers, in particular, "are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *Southern Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)). Requiring individuals (or corporate principals) to

reside in the communities they serve for a sustained period before becoming eligible for retail or wholesale licenses ensures that each seller "will be knowledgeable about the community's needs and committed to its welfare." *Id.*

In the decision below, however, the Sixth Circuit held, over Judge Sutton's dissent, that Tennessee's durational-residency requirements violate the dormant Commerce Clause. The court acknowledged and deepened a circuit split about the constitutionality of such laws. The Fifth and now Sixth Circuits have held that durational-residency requirements violate the dormant Commerce Clause. The Eighth Circuit, in contrast, has held that they are a valid exercise of States' Twenty-first Amendment authority. As the Eighth Circuit put it, "state policies that define the structure of the [three-tier] liquor distribution system" are "'protected under the Twenty-first Amendment'" "against constitutional challenges based on the Commerce Clause," as long as they "giv[e] equal treatment to in-state and out-of-state liquor *products* and *producers* . . . ." *S. Wines & Spirits*, 731 F.3d at 809 (quoting *Granholm*, 544 U.S. at 489) (emphasis added). In so holding, the Eighth Circuit agreed with the approach of the Second and Fourth Circuits, which, following *Granholm*, upheld other kinds of residency-related restrictions on retailers and wholesalers.

This issue is important. It determines the constitutionality of durational-residency laws in at least twenty-one States. And in resolving the question presented, the Court will provide much-needed guidance to courts that have struggled to understand *Granholm*'s implications for other

restrictions that states impose on retailers and wholesalers. This case is also a clean vehicle—a declaratory-judgment action filed solely to determine the constitutionality of the law at issue. Finally, the decision below—which leaves next to no continuing role for Section 2 of the Twenty-first Amendment's grant of authority to the States—is wrong. The Court should grant certiorari and reverse the decision below.

OPINIONS BELOW

The District Court's opinion granting summary judgment to Respondent Tennessee Fine Wines (Pet.App. 57a–81a) is published at 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The Sixth Circuit's decision affirming that judgment (Pet.App. 1a–56a) is published at 883 F.3d 608 (6th Cir. 2018).

JURISDICTION

The Sixth Circuit entered judgment on February 21, 2018. On April 26, 2018, Justice Kagan extended the time to file a certiorari petition to and including July 21, 2018. No. 17A1186. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment of the United States Constitution provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

2. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl.3.

3. Section 57-3-204(b) of the Tennessee Code Annotated, which addresses the issuance of licenses for the retail sale of alcoholic beverages, provides, in relevant part:

> (2) No retail license under this section may be issued or transferred to or held by, to any individual:
>
> > (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;
>
> [. . .]
>
> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:
>
> > (A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible to

receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director, or stockholder in their individual capacity;

(B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

[. . .]

(D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

(4) It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained

> in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

STATEMENT

1. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). Consistent with that broad grant of authority, States are free "to ban the sale and consumption of alcohol altogether." *Id.* at 488–89. Alternatively, "States may . . . assume direct control of liquor distribution through state-run outlets." *Id.* at 489. Or they can set up a regulatory scheme governing private manufacturers, distributors, and retailers. Such three-tier systems are

"unquestionably legitimate." *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

To be sure, state alcohol laws may be limited in some respects by the dormant Commerce Clause, which generally prevents States from "discriminat[ing] against interstate commerce" or "favor[ing] in-state economic interests over out-of-state interests." *See id.* at 487 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)). For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court invalidated an excise tax that exempted some liquors produced in-State, where the sole, "undisputed . . . purpose of the exemption" was "mere economic protectionism" rather than "any clear concern of the Twenty-first Amendment." *Id.* at 271, 276. This Court later emphasized in *Granholm*, however, that "state policies" that define the structure of a three-tier distribution system "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. *Granholm* thus distinguished between discrimination against out-of-state products, which the dormant Commerce Clause prohibits, and a State's decisions about "how to structure the liquor distribution system" within its borders, over which "[t]he Twenty-first Amendment grants the States virtually complete control." *Id.* at 488. Indeed, all nine Justices agreed that States have virtually plenary authority over structuring a three-tier liquor distribution system, at least as long as they provide equal treatment to liquor produced in and out of state. *See id.*; *see also id.* at 518 (Thomas, J. dissenting).

2. Tennessee, like most States, has implemented a three-tier regulatory scheme for the distribution of alcohol. *See* Pet.App. 2a; *see also* *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008) (describing Tennessee's regulatory framework). Under that scheme, "[m]anufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; [and] consumers are required to buy only from retailers." Pet. App 2a (quoting *Jelovsek*, 545 F.3d at 434); *see also* Tenn. Code Ann. § 57-3-404(b)–(d). The Tennessee Alcoholic Beverage Commission ("TABC" or the "Commission") oversees this system and issues licenses to individuals and entities that meet the statutory requirements. *See* Pet.App. 2a–3a; Tenn. Code Ann. § 57-3-201.

This case is about the statutory requirements for retail licenses. Tennessee law provides that, to obtain a retail license, an individual must have "been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made." Tenn. Code Ann. § 57-3-204(b)(2)(A). Corporations, for their part, are ineligible for a retail license "if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)." *Id.* § 57-3-204(b)(3)(A).[1]

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[1] Two other aspects of Tennessee's regulatory scheme were also at issue in the lower courts: "its application of the residency requirement to 100% of a retailer's stockholders, Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D), and its imposition

The Tennessee legislature codified its explanation of the health and safety benefits of these durational-residency requirements:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, . . . it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein . . . .

Tenn. Code Ann. § 57-3-204(b)(4).

3. Respondents Tennessee Fine Wines and Spirits, LLC ("Fine Wines") and Affluere Investments, Inc. ("Affluere") applied for Tennessee retail licenses in November 2016. *See* Pet.App. 3a. It is undisputed that neither entity satisfies the durational-residency requirements for these licenses. *See id.*; D.Ct. Dkt. 1-1, Compl. ¶¶ 12–13. Both entities have principal addresses outside Tennessee. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶¶ 3–4. And although Fine Wines is a Tennessee limited liability company, none of its members are Tennessee

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(continued...)

of a ten-year residency requirement for renewal of a license, *id.* § 57-3-204(b)(2)(A)." Pet.App. 54a (Sutton, J., dissenting).

residents. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶ 4.

Petitioner Tennessee Wine and Spirits Retailers Association (the "Association") represents the interests of licensed Tennessee retailers. *See* Pet.App. 4a. The Association learned that the TABC was considering granting Fine Wines's and Affluere's retail-license applications despite their failure to satisfy the durational-residency requirements. *See id.* The Association then told the TABC that it would immediately sue over licenses issued in violation of state law. *See* D.Ct. Dkt. 1-1, Compl. ¶ 17. Fine Wines and Affluere, for their part, told the TABC that they would sue to challenge the constitutionality of the durational-residency requirements if the TABC denied their applications. *See id.* ¶ 18.

"[F]ace[d] [with] imminent litigation" over this dispositive issue, *id.* ¶ 25, the TABC's Executive Director, Clayton Byrd, filed a declaratory-judgment action in Tennessee state court. *See* Pet.App. 4a. Byrd named Fine Wines, Affluere, and the Association as Defendants. *See generally* D.Ct. Dkt. 1-1, Compl. The Complaint explained that the TABC's staff "f[ound] no other grounds for denying [Fine Wines' and Affluere's] license applications" besides the "statutory residency requirement." *Id.* ¶ 14. Byrd therefore sought a declaratory judgment about the constitutionality of those requirements, so that the TABC could "lawfully fulfill its duties . . . and correctly determine whether nonresident Defendants [Fine Wines and Affluere] may be issued a retail liquor license." *Id.* ¶ 27.

The Association removed the case on federal-question grounds. *See* Pet.App. 4a. The District

Court then realigned the parties to reflect their interests in the litigation, denominating Fine Wines and Affluere as Plaintiffs and the Association as Defendant. *See id.* at 4a n.1.[2]

Fine Wines moved for summary judgment, arguing that Tennessee's durational-residency requirements violate the dormant Commerce Clause. *See id.* at 57a–58a. Affluere sought a preliminary injunction on the same basis. *See* D.Ct. Dkt. 63.

4. The District Court granted Fine Wines' motion for summary judgment. Despite *Granholm*'s limitation of dormant Commerce Clause scrutiny to laws that "discriminate in favor of local *producers*," 544 U.S. at 489 (emphasis added), the court held that such scrutiny also extends to state laws governing local *retailers*. *See* Pet.App. 65a–72a. Next, the court found that Tennessee's durational-residency requirements in fact discriminate in favor of in-state retailers, even though they apply to in-state and out-of-state retailers alike. *Id.* at 73a–76a. Finally, the District Court found that those requirements do not "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 80a. The District Court therefore held that Tennessee's durational-residency requirements violate the dormant Commerce Clause, and enjoined their enforcement. *Id.* at 80a–801a.

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[2] Although Byrd remained denominated as a Plaintiff, he defended the constitutionality of the state law in response to Fine Wines' summary judgment motion in the District Court, and on appeal in the Sixth Circuit. *See* Pet.App. 4a n.1.

6. A divided panel of the Sixth Circuit affirmed. The majority observed that this Court's precedents "ha[ve] created some uncertainty" about whether "the dormant Commerce Clause appl[ies] only when an alcoholic-beverages law regulates producers or products," or whether it also applies to regulations of retailers and wholesalers. *Id.* at 11a. And it acknowledged a circuit split on that fundamental question. *See id.* at 11a–12a. The Second, Fourth, and Eighth Circuits have interpreted *Granholm* to mean that the dormant Commerce Clause applies only to state laws that regulate alcohol *producers* or *products*. *See id.* at 12a–13a; *see also Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *S. Wine & Spirits*, 731 F.3d at 809–10. According to these circuits, the Twenty-first Amendment protects laws regulating alcohol *retailers* and *wholesalers* from dormant Commerce Clause scrutiny. The Fifth Circuit, on the other hand, has extended *Granholm* to retail regulation, and has held that durational-residency requirements fail dormant Commerce Clause scrutiny. *See* Pet.App. 13a–14a; *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*).

The panel majority followed the Fifth Circuit. *See* Pet.App. 15a. Like the Fifth Circuit, the panel wrote off the producer-specific language in *Granholm*, asserting that *Granholm* had "discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. And it relied on this Court's

earlier decision in *Bacchus* in holding that the dormant Commerce Clause extends to the regulation of retailers. *See id.* at 22a–23a.

The majority again followed the Fifth Circuit's reasoning in finding that Tennessee's interest in the durational-residency requirements did not implicate the core purposes of the Twenty-first Amendment. *See id.* at 24a–27a. These requirements, the court reasoned, "regulate the flow of individuals" rather than "the flow of alcoholic beverages within the state." *Id.* at 27a. Accordingly, the Twenty-first Amendment does not "immunize" them from "scrutiny under the dormant Commerce Clause." *Id.*

Finally, the majority concluded that Tennessee's law failed that scrutiny. The court acknowledged that the State had asserted two legitimate purposes for the durational-residency requirements—"(1) protecting 'the health, safety and welfare' of its citizens and (2) using a higher level of oversight and control over liquor retailers." *Id.* at 32a (quoting Tenn. Code Ann. § 57-3-204(b)(4)). But the court hypothesized that the State could achieve those purposes through nondiscriminatory means (for example, by "creating an electronic database to monitor liquor retailers"). *Id.* at 33a. Accordingly, the court held that the durational-residency requirements violated the dormant Commerce Clause, severed them from the Tennessee statute, and enjoined their enforcement. *See id.* at 33a–39a.

7. Judge Sutton dissented in relevant part. He began with the Constitution's text. Judge Sutton explained that the Commerce Clause's "dormant" aspect impliedly prohibits States from interfering with Congress's prerogative to "regulate Commerce

with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* at 40a (quoting U.S. Const. art. I, § 8, cl. 3). And "[w]hatever else this Tennessee requirement does," Judge Sutton observed, "it does not purport to displace or contradict congressional regulation of commerce among the States." *Id.* at 41a. As to the Twenty-first Amendment, Judge Sutton stressed that the text "prohibit[s] the 'delivery or use' of alcohol 'in violation of the laws' of each State," which "empowers States to regulate sales of alcohol within their borders." *Id.* (quoting U.S. Const. amend. XXI, § 2).

Judge Sutton also looked to history. In the beginning, he explained, federal and state government powers were "[l]argely exclusive." *Id.* at 42a. But that changed over time. As the federal commerce power expanded, the line between the two regulatory spheres blurred, until most business activities became subject to both state and federal regulation. *See id.* at 42a–43a. Accordingly, the scope of the dormant Commerce Clause—which was once crucial for keeping States from interfering in the federal sphere—became, in Judge Sutton's view, "more difficult to articulate and police." *Id.* at 46a.

Against that historical backdrop, Judge Sutton addressed this Court's Twenty-first Amendment precedents. Those precedents make clear that "the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain." *Id.* at 48a. But "exceptions to the normal operation of the Commerce Clause remain alive and well in some areas—in particular the in-state nature of alcohol distribution." *Id.* at 49a. Indeed, *Granholm*

expressly said that, because in-state distribution "implicates the States' core interests after the repeal of Prohibition, such regulations are generally 'protected under [the Twenty-first Amendment] when they treat liquor produced out of state the same as its domestic equivalent.'" *Id.* (quoting *Granholm*, 544 U.S. at 488). Put differently, "[s]tate regulations of ***in-state distribution***, even if facially discriminatory, are constitutional unless a challenger can show that they serve *no purpose* besides 'economic protectionism.'" *Id.* (quoting *Bacchus*, 468 U.S. at 276) (emphases added).

"Measured by these standards and cases," Judge Sutton concluded, "Tennessee's two-year residency requirement should survive." *Id.* Some requirement that retailers reside in-state is an inherent part of the three-tier system that this Court has repeatedly and unequivocally endorsed. *See id.* at 50a. Moreover, "retailers are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *S. Wine & Spirits*, 731 F.3d at 811). And durational-residency requirements for retailers ensure that individuals responsible for the sale of alcohol to Tennessee citizens will develop an understanding of and commitment to the needs of the local community before becoming licensed to sell alcohol directly to the members of that community. *See id.* The same logic applies "to a residency requirement for officers and directors of the retailer." *Id.* at 51a. Accordingly, Judge Sutton would have followed the Eighth Circuit, which "approved [durational-residency] requirements nearly identical to Tennessee's." *Id.* In contrast, Judge Sutton

explained, the panel majority and the Fifth Circuit in *Cooper II* "misread *Granholm*" and contravened the Twenty-first Amendment by allowing "a court [to] unnecessarily substitute its own judgment for that of a state legislature about the best policies for regulating liquor." *Id.* at 53a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are squarely divided about whether a state may exercise its Twenty-first Amendment authority by requiring individuals or entities to reside in-state for a certain period before they may obtain a retail or wholesale liquor license. The Fifth and Sixth Circuits have held that such laws violate the dormant Commerce Clause; the Eighth Circuit has held that they are valid under the Twenty-first Amendment. This divide reflects a fundamental disagreement—one that the Second and Fourth Circuits have also addressed—about whether and how, in light of *Granholm*, the dormant Commerce Clause limits state authority to regulate alcohol retailers and wholesalers (as opposed to producers). This issue is important, particularly given the prevalence of durational-residency requirements and other residency-related regulations of wholesalers and retailers. And the decision below is wrong because it misunderstands the text of the relevant constitutional provisions and misconstrues this Court's precedents. This Court should grant the petition for a writ of certiorari and reverse the judgment of the Sixth Circuit.

I. THE COURTS OF APPEALS ARE DIVIDED.

A. The Fifth and Sixth Circuits Have Struck Down Durational-Residency Requirements.

1. In *Cooper II*, the Fifth Circuit held that Texas's one-year residency requirement for liquor retailers violated the dormant Commerce Clause. *See* 820 F.3d 730 (upholding injunction against enforcement of Tex. Alco. Bev. Code Ann. § 109.53).

The case involved a decades-old injunction issued in a suit brought by two individuals who did not reside in Texas but wanted to buy a Texas nightclub licensed to sell liquor. *See Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (*Cooper I*). In *Cooper I*, which predated this Court's decision in *Granholm*, the Fifth Circuit relied mainly on *Bacchus* in concluding that Texas's durational-residency requirement violated the dormant Commerce Clause. *See id.* at 555. The Fifth Circuit therefore enjoined Texas from enforcing its law. *See id.* at 555–56.

Later, in *Granholm*, this Court explained that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. So a trade association, the Texas Package Stores Association, intervened and moved for relief from the outdated injunction, because Texas's law—which regulated retailers and wholesalers, and had nothing to do with disparate treatment of in-state and out-of-state liquor producers—passed *Granholm*'s test. *See Cooper II*, 820 F.3d at 734–36.

The Fifth Circuit adhered to its holding that Texas's durational-residency requirement was

unconstitutional. The court dismissed as dicta *Granholm*'s statements that three-tier systems are "unquestionably legitimate" and that policies that do not discriminate against liquor produced out of state are "protected under the Twenty-first Amendment." *Id.* at 742–43 (quoting *Granholm*, 544 U.S. at 489). Indeed, it held precisely the opposite—that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." *Id.* at 743. "Distinctions between in-state and out-of-state retailers and wholesalers are permissible," the Fifth Circuit concluded, "only if they are an inherent aspect of the three-tier system." *Id.* And in the Fifth Circuit's view, a "durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers" is not an inherent requirement of such a system. *Id.*

2. As described above, *see supra* 12–13, the Sixth Circuit majority below followed *Cooper II*. The court below summarized, at length, the varying attempts of the "Second, Fourth, Fifth, and Eighth Circuits . . . to reconcile [this Court's] cases" involving the Twenty-first Amendment. Pet.App. 11a. Rejecting the approach of most of these circuits, the Sixth Circuit "f[ou]nd the Fifth Circuit's reconciliation of *Bacchus* and *Granholm* persuasive." *Id.* at 15a. In particular, the court emphasized that "the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*." *Id.* And it afforded little weight to *Granholm*'s statements about liquor production because "*Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. Moreover, because "Tennessee's durational-

residency requirements are nearly identical to" Texas's, the court found that the analysis in *Cooper II* was on all fours with this case. *Id.* at 26a. It therefore held that the dormant Commerce Clause bars Tennessee from requiring that a liquor retailer reside in-state for a set time to be eligible for a license.

B. The Eighth Circuit Has Upheld Durational-Residency Requirements.

Judge Sutton would have followed the Eighth Circuit's "thoughtful opinion" in *Southern Wine & Spirits v. Div. of Alcohol & Tobacco*, 731 F.3d 799 (8th Cir. 2013), which upheld "requirements nearly identical to Tennessee's." Pet. App. at 51a. That case involved a Missouri law providing that a license to engage in the wholesale distribution of "intoxicating liquor containing alcohol in excess of five percent by weight" could be granted only to a "resident corporation"—*i.e.*, one whose corporate officers and directors had been "bona fide residents" of Missouri for at least three years. Mo. Rev. Stat. §§ 311.060.2(3), 311.060.3. The plaintiff, an entity ineligible for a license because of that requirement, alleged that Missouri's law violated the dormant Commerce Clause.

Writing for a unanimous panel, Judge Colloton acknowledged that "the Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions." 731 F.3d at 804. *Granholm* itself, however, had reconciled this Court's earlier precedents. On the one hand, "the Twenty-first Amendment granted the States 'virtually complete control over whether to permit importation or sale of liquor and how to structure the

liquor distribution system.'" *Id.* at 805 (quoting *Cal. Retail*, 445 U.S. at at 110). On the other hand, state regulations of production, rather than distribution, do not implicate core Twenty-first Amendment authority and thus must comply with the dormant Commerce Clause. *See id.* (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984)). Consistent with these principles, *Granholm* concluded that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment," *Granholm*, 544 U.S. at 466, so long as "they treat liquor produced out of state the same as its domestic equivalent," *id.* at 489.

Applying these standards, the Eighth Circuit upheld Missouri's durational-residency requirement. The court first rejected the argument that the law was unconstitutional in light of *Bacchus*. Even "[a]ssuming that *Bacchus*'s analysis of economic protectionism should apply to a regulation of the wholesale tier," the court reasoned, a durational-residency requirement has a non-protectionist rationale: "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals." *S. Wine & Spirits*, 731 F.3d at 807–09 (citing Mo. Rev. Stat. § 311.015). In any event, the court held, consistent with *Granholm*, that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are 'protected under the Twenty-first Amendment.'" *Id.* (quoting *Granholm*, 544 U.S. at 489). Because durational-residency requirements fit that bill, the court upheld Missouri's law as a

permissible exercise of Twenty-first Amendment authority—regardless of whether it would otherwise offend the dormant Commerce Clause. *See id.* at 810. The court added, finally, that durational-residency requirements would pass muster even if some Commerce Clause scrutiny applied: "Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *Id.* at 811.

C. Applying the Same Approach as the Eighth Circuit, the Second and Fourth Circuits Have Upheld Other Residency-Related Restrictions on Retailers and Wholesalers.

Two other courts of appeals—the Second and Fourth Circuits—have rejected constitutional challenges to other kinds of residency-related restrictions on wholesalers and retailers. Both circuits adopted the same approach as the Eighth Circuit. They upheld these state laws because, under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state *producers*." *Brooks*, 462 F.3d at 354 (emphasis added).

1. In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, the Second Circuit upheld a New York law prohibiting "out-of-state wine retailers from selling and delivering wine directly to New York consumers." *Id.* at 187; *see* N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b). That ruling followed directly from *Granholm*, which "set forth the test for determining the constitutionality of state liquor

regulations." *Arnold's Wines*, 571 F.3d at 189. "While the Twenty-first Amendment grants the states broad powers to regulate the transportation, sale, and use of alcohol within their borders, it simply does not immunize attempts to discriminate in favor of local products and producers." *Id.* at 191. Those principles, the court held, foreclosed the plaintiffs' claim. "Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state *products* or *producers*," the court found no need to "analyze the regulation further under Commerce Clause principles." *Id.*

Judge Calabresi concurred, writing separately to say that this Court has, "[r]egrettably," "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [its] Twenty-First Amendment decisions." *Id.* at 192. Judge Calabresi also noted that the Twenty-first Amendment, in a departure from its original meaning, "has been defined and redefined to accommodate changing social needs and norms," making it a case study of the "important theoretical questions about the role of courts" in constitutional interpretation. *Id.*

2. The Fourth Circuit similarly upheld a Virginia law that, among other things, established an "exception to the three-tier import restriction for consumers who personally carry into Virginia no more than one gallon (or four liters) of alcoholic beverages for personal consumption." *Brooks*, 462 F.3d at 345; *see* Va. Code § 4.1–310(E). The plaintiffs argued that this exception violated the dormant

Commerce Clause by favoring in-state retailers, who could sell unlimited amounts of liquor to Virginia residents, over their out-of-state counterparts, who could sell only a single gallon. 462 F.3d at 352.

The Fourth Circuit recognized that *Granholm* foreclosed that argument. Under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers." *Id.* at 354. "[A]n argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." *Id.* at 352. And *Granholm*, the court held, precludes any such challenge. *See id.*

3. These Second and Fourth Circuit decisions involved residency-related regulations other than durational requirements. But both turned on the same core question as the decision below, and the Fifth and Eighth Circuit durational-residency cases: In the wake of *Granholm*, "[d]oes scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products?" Pet.App. 11a. The circuits are intractably divided about how to analyze the constitutionality of state laws regulating retailers and wholesalers of alcohol.

II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION.

1. At least twenty-one states impose durational-residency requirements on alcohol retailers or

wholesalers.[3] These requirements vary in some ways. *Compare, e.g.*, S.C. Code Ann. § 61-6-110 (30-day residency requirement), *with* Okla. Stat. tit. 37, § 527 (10-year residency requirement); *compare, e.g.*, Ky. Rev. Stat. Ann. § 243.100(1)(f) (requirement applicable to individuals only), *with* Ind. Code § 7.1-3-21-5 (requirement applicable to both individuals and corporations); *see also, e.g.*, Ga. Code Ann. § 3-4-23(a) (requirement specific to the county or municipality). But this variation merely reflects the States' use of their Twenty-first Amendment authority and expertise to craft liquor laws that suit the needs of their residents. Under the Sixth Circuit's reasoning, all of these laws are likely unconstitutional.

There are many more state laws that—like those at issue in the Second and Fourth Circuit decisions—impose other forms of residency-related restrictions on retailers or wholesalers. *See, e.g.*, 235 Ill. Comp. Stat. 5/6-29.1(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly

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[3] *See* Ark. Code Ann. § 3-4-606(a)(1)–(3); Ga. Code Ann. § 3-4-23(a)–(b); Ind. Code Ann. § 7.1-3-21-5(5)(a)–(b); Kan. Stat. Ann. § 41-311(b); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. tit. 28-A, § 1401(5)(A)–(B); Md. Code, Alcoholic Beverages, § 3-102; Mich. Comp. Laws Ann. §436.1601; Miss. Code. Ann. § 67-3-21; Mo. Rev. Stat. § 311.060.2(3); N.H. Rev. Stat. Ann. § 178:1; Okla. Stat. Ann. tit. 37, § 527; 47 Pa. Stat. Ann. §§ 4-403, 4-410, 4-431, 4-432; S.C. Code Ann. § 61-6-110(2); Tenn. Code Ann. § 57-3-203; Tex. Alco. Bev. Code Ann. § 6.03(a); Va. Code Ann. § 4.1-222; Wash. Rev. Code Ann. § 66.24.010(2)(a); W. Va. Code Ann. § 11-16-8(a)(1); Wis. Stat. Ann. § 125.04(5); *see also* Idaho Code Ann. § 23-304 (durational-residency requirement for "special distributors").

to Illinois consumers); N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly to New York consumers); Va. Code § 4.1–310(E) (creating an exception to personal-import ban that favors in-state retailers); Cal. Bus. & Prof. Code § 23366.2 (prohibiting out-of-state wholesalers, but not in-state wholesalers, from selling liquor directly to in-state retailers). The constitutionality of these laws, too, turns on the interplay between the Twenty-first Amendment and the dormant Commerce Clause when it comes to state regulation of alcohol retailers and wholesalers.

2. The constitutionality of dozens of state laws is more than important enough to merit this Court's intervention. *See, e.g.*, *Sveen v. Melin*, 138 S. Ct. 1815 (2018) (considering the constitutionality of retroactive application of state revocation-on-divorce statutes); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (considering the constitutionality of state statutes limiting sex offenders' internet access); *cf. Cty. of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from denial of certiorari) ("States deserve our careful consideration when lower courts invalidate their constitutional provisions.").

This Court has also often granted certiorari to resolve conflicts among the courts of appeals about the meaning of the Twenty-first Amendment. *See, e.g.*, *Granholm*, 544 U.S. 460; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *North Dakota*, 495 U.S. 423; *Bacchus Imports*, 468 U.S. 263. But it has been thirteen years since the Court has addressed this constitutional provision. And in that

time, perceived contradictions within this Court's Twenty-first Amendment jurisprudence have "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [this Court's] Twenty-First Amendment decisions." *Arnold's Wines*, 571 F.3d at 192 (Calabresi, J., concurring). Indeed, courts have consistently acknowledged the pervasive confusion about the interaction of the Twenty-first Amendment and the dormant Commerce Clause post-*Granholm*. *See id.* at 200 (observing that lower courts have been left "in a difficult situation"); *S. Wine & Spirits*, 731 F.3d at 804 ("[T]he Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions."); Pet.App. 11a ("The interaction between *Bacchus* and *Granholm* has created some uncertainty."). Only this Court can alleviate that confusion—and resolve the resulting division of authority.

4. This petition presents a clean vehicle for this Court to do so. This case is a declaratory-judgment action raising a single question: whether Tennessee's durational-residency requirements are a constitutional exercise of the State's authority under the Twenty-first Amendment, or are instead prohibited by the dormant Commerce Clause. Pet.App. 4a. The Complaint alleges that this question determines the entitlement of the Respondent applicants to liquor licenses. D.Ct. Dkt. 1-1, Compl. ¶¶ 14, 27. And the parties preserved, and the lower courts decided, that question at each stage of the proceedings below. This Court should take this opportunity to decide this important issue,

which affects the constitutionality of dozens of state laws and has prompted numerous court of appeals judges to lament the confusion flowing from this Court's existing precedents.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The decision below is wrong as a matter of constitutional text, history, and this Court's precedents. Indeed, the Sixth Circuit majority effectively neuters Section 2 of the Twenty-first Amendment and *Granholm*'s promise that States have broad leeway to structure three-tier distribution systems.

1. The Twenty-first Amendment gives States broad authority to regulate "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2. "Unlike any other provision in the U.S. Constitution," the Amendment thereby "sets up what is largely a regulatory regime of one." Pet.App. at 41a (Sutton, J., dissenting). And its text does not limit State authority in this arena.

The Commerce Clause, in turn, grants Congress exclusive authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl.3. The dormant aspect of that Clause reinforces that exclusivity, impliedly prohibiting states from exercising authority in that exclusively federal arena. *See* Pet.App. at 42a–44a.

2. The history of these provisions shows how the drafters of the Twenty-first Amendment expected them to operate in tandem. At the time that Amendment was adopted in 1933, the state and

federal "spheres of authority" were "[l]argely exclusive." *Id.* at 42a. So if the States had authority in a particular area, the federal government generally did not—and vice versa. *See id.* Accordingly, "[f]rom the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol within the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of regulatory power." *Id.* at 44a.

It is unsurprising, therefore, that this Court at first understood the Twenty-first Amendment to give States essentially plenary authority to regulate intrastate alcohol distribution, "including in ways that the Commerce Clause would not otherwise allow." *Id.* at 46a:

> The words used [in § 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

But things changed. The scope of federal power to regulate commerce expanded, injecting federal authority into what were once exclusively state arenas. And the understanding of the dormant Commerce Clause changed, too: "[I]n a post-1930s world, in which the National Government and States largely have overlapping power over most sectors of commerce, the implementation of an implied restriction on state authority is much more difficult to articulate and police." *See* Pet.App. 45a–46a. Still, however, "[a]n exclusive delegation of power to one sovereign"—whether that be the grant of alcohol-regulatory authority to the states or the grant of commerce power to the federal government—"implies a ban on assertions of power by another sovereign over the same matter." *Id.*

3. This Court's more recent Twenty-first Amendment cases confirm that States retain special authority in regulating alcohol. *See Capital Cities*, 467 U.S. at 712 (explaining that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause"). States maintain "virtually complete control" over "how to structure the[ir] liquor distribution system[s]." *Granholm*, 544 U.S. at 488.

Granholm, this Court's most recent case about the Twenty-first Amendment, involved regulations that permitted in-state wineries, but not out-of-state ones, to ship directly to in-state consumers. 544 U.S. at 468–70. This "differential treatment between in-state and out-of-state wineries," the Court explained, "constitute[d] explicit discrimination" against the flow of goods across state lines in a way that—were it

not for the Twenty-first Amendment—would violate the dormant Commerce Clause. *Id.* at 467.

The Twenty-first Amendment, the Court also determined, did not "sav[e]" these laws. *Id.* at 489. In particular, that provision "does not displace the rule that States may not give a discriminatory preference to their own *producers*." *Id.* at 486 (emphasis added). And it does "not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484–85. Accordingly, because the laws at issue were "straightforward attempts to discriminate in favor of local producers" (and thus against out-of-state goods) the Court held that they violated the dormant Commerce Clause. *Id.* at 489.

The *Granholm* Court, however, was careful to cabin its ruling—and preserve the force of the Twenty-first Amendment. The Court emphasized that it did not "call into question the constitutionality of the three-tier system"—a system both the majority and dissent recognized as "unquestionably legitimate." *Id.* at 488–89; *see also id.* at 518 (Thomas, J., dissenting). And the Court made clear that the Twenty-first Amendment still provided absolute protection for regulation of in-state sales, rather than products. "State policies," the Court stated, "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

4. That principle resolves this case. Tennessee's durational-residency requirements, like other such laws, "treat liquor produced out of state the same as its domestic equivalent." *Id.* As a

result, *Granholm* compels the conclusion that they are "protected under the Twenty-first Amendment." *Id.* Were it otherwise—if, as the Sixth Circuit majority suggested, the Twenty-first Amendment conferred no special protections for laws regulating wholesalers and retailers of alcohol—Section 2 of the Twenty-first Amendment would have little or no role to play. A dormant Commerce Clause challenge to a regulation concerning alcohol, in other words, would be no different than such a challenge to any other kind of regulation. Neither constitutional history nor this Court's precedents support that result. *See Capital Cities*, 467 U.S. at 712 (observing that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause").

In any event, even if laws exclusively applicable to retailers or wholesalers were subject to some limited form of dormant Commerce Clause scrutiny, durational-residency requirements should survive. These requirements serve important State interests in protecting the "health, safety and welfare" of citizens. Tenn. Code Ann. § 57-3-204(b)(4). The consequences of excessive alcohol consumption—such as drunk driving, loss of employment, and homelessness—do not fall on one individual alone; they affect the community as a whole. Durational-residency requirements ensure that alcohol retailers know their community and are invested in its welfare. In other words, "[t]he only way to know a community is to live there." Pet.App. 50a. Indeed, that is presumably "why Congress requires federal court of appeals judges to live within their circuits, and district court judges to live within their districts." *Id.* at 50a–51a (citing 28 U.S.C. §§ 44(c),

134(b)). Durational-residency requirements like Tennessee's serve the same interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

July 20, 2018

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APPENDIX

APPENDIX A

Clayton BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More; Affluere Investments, Inc., dba Kimbrough Fine Wines &Spirits

Plaintiffs-Appellees,

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Defendant-Appellant.

No. 17-5552

United States Court of Appeals,
Sixth Circuit.

Argued: November 30, 2017

Decided and Filed: February 21, 2018

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:16-cv-02738—Kevin H. Sharp, District Judge.

Before: DAUGHTREY, MOORE, and SUTTON, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Defendant-Appellant Tennessee Wine and Spirits Retailers Association ("Association") appeals the district court's order granting summary judgment regarding § 57-3-204(b) of Tennessee Code Annotated. Under § 57-3-204(b), to receive a retailer-alcoholic-beverages license, a person, corporation, or firm needs to be a Tennessee resident for at least two years, and to renew a license, there is a ten-year requirement. After examination, the district court determined that these durational-residency requirements violate the dormant Commerce Clause.

For the reasons discussed below, we **AFFIRM** the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the dormant Commerce Clause and **SEVER** those provisions from the Tennessee statute.

I. BACKGROUND

In Tennessee, the distribution of alcoholic beverages occurs through a "three-tier system." *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008). "The Tennessee Alcoholic Beverage Commission ('TABC') issues separate classes of licenses to manufacturers and distillers, wholesalers, and liquor retailers." *Id.* at 433–34 (citing Tenn. Code Ann. § 57-3-201). "Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; consumers are required to buy only from retailers." *Id.* at 434 (citing Tenn. Code Ann. § 404(b)–(d)).

A license from the TABC is required to sell "alcoholic spirituous beverages, including beer and

malt beverages." Tenn. Code Ann. § 57-3-204(a). However, to obtain a license, an individual must have "been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made to the commission." *Id.* § 57-3-204(b)(2)(A). Additionally, the statute imposes a ten-year residency requirement to renew the license. *Id.*

A corporation faces similar barriers, and it cannot receive a license "if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)." *Id.* § 57-3-204(b)(3)(A). Moreover, "[a]ll of [a corporation's] capital stock must be owned by individuals who are residents of [Tennessee] and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or," for renewal, "has at any time been a resident of [Tennessee] for at least ten (10) consecutive years." *Id.* § 57-3-204(b)(3)(B).

Two entities—Plaintiff-Appellee Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More, and Plaintiff-Appellee Affluere Investments, Inc., d/b/a/ Kimbrough Fine Wine & Spirits—did not satisfy these barriers prior to applying for retail licenses. As of November 2016, Fine Wines's principal address and Affluere's principal address were outside of Tennessee. R. 23-2 (Resp. Ex. 2) (Page ID #133); R. 23-3 (Resp. Ex. 3) (Page ID #134). And Fine Wines's members are not Tennessee residents. R. 55-1 (Mot. Summ. J. Ex. 1 ¶ 5) (Page ID #298). Therefore, the TABC deferred voting on these applications. *Id.* ¶¶ 13, 15 (Page ID

#299); R. 1-1 (Compl. ¶ 15) (Page ID #7); R. 1-2 (Affluere Answer ¶ 15) (Page ID #38).

When the Association, which represents Tennessee's business owners, discovered that Fine Wines and Affluere had pending applications, it informed the TABC that litigation was likely. R. 1-1 (Compl. ¶¶ 2, 16, 17) (Page ID #5, 8); R. 80 (Ass'n Am. Answer ¶¶ 2, 16, 17) (Page ID #495, 498). Because of these conflicts, Tennessee's Attorney General filed this action in the Chancery Court for Davidson County, on behalf of Plaintiff-Appellee Clayton Byrd, the Executive Director of the TABC, to obtain a declaratory judgment construing the constitutionality of the durational-residency requirements. R. 1-1 (Compl. at 1) (Page ID #4). The Defendant Association removed the case to the United States District Court for the Middle District of Tennessee.[1]

The district court determined that the durational-residency requirements are unconstitutional. *See Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 259

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[1] After the Association removed the action to federal court, R. 1 (Notice Removal at 1) (Page ID #1), the district court realigned Fine Wines and Affluere as plaintiffs because, in his complaint, Byrd contended that the durational-residency requirements may be unconstitutional, which the Attorney General highlighted in two opinions. R. 52 (Op. Mem. at 11) (Page ID #282); R. 53 (Order ¶ 2) (Page ID #289). However, in his response to Fine Wines's motion for summary judgment, Byrd asserted that the durational-residency requirements are not unconstitutional. *See* R. 73 (Resp. at 1–13) (Page ID #450–62). Byrd continues to assert during this appeal that the durational-residency requirements are not unconstitutional. *See* Appellee Byrd Br. at 3.

F.Supp.3d 785, 797–98 (M.D. Tenn. 2017). Based on the statutory language, the district court found that the durational-residency requirements are facially discriminatory. *See id.* at 790. And although the Twenty-first Amendment does give Tennessee power to regulate alcoholic beverages, the district court "agree[d] with the Fifth Circuit that 'state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor.' " *Id.* at 790, 793 (quoting *Cooper v. Tex. Alcoholic Beverage Comm'n (Cooper II)*, 820 F.3d 730, 743 (5th Cir.), *cert. denied sub nom. Tex. Package Stores Ass'n, Inc. v. Fine Wine & Spirits of N. Tex., LLC*, — U.S. ——, 137 S.Ct. 494, 196 L.Ed.2d 404 (2016)). Additionally, nondiscriminatory alternatives could achieve the durational-residency requirements' purposes—citizen health and alcohol regulation. *Id.* at 796–97. The district court therefore determined that Tennessee's durational-residency requirements violate the dormant Commerce Clause and granted Fine Wines's motion for summary judgment. *Id.* at 797–98.

II. DISCUSSION

We review de novo a district court's decision to grant summary judgment, *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005), and we also review de novo a district court's determination of the constitutionality of a state statute, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006). Granting summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

P. 56(a). For this determination, we review all facts in a light that is most favorable to, and draw all reasonable inferences in favor of, the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

A. The Twenty-first Amendment Does Not Immunize Tennessee's Durational-Residency Requirements

Under the Supreme Court's governing standard, Tennessee's interests in the durational-residency requirements are not closely related to its power under the Twenty-first Amendment. Therefore, the Twenty-first Amendment does not immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause.

1. Tennessee's Durational-Residency Requirements in Light of *Granholm* and *Bacchus*

Section 2 of the U.S. Constitution's Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend XXI, § 2. Pursuant to the Twenty-first Amendment, a state has the power to regulate the distribution of alcoholic beverages into the state or within its borders.

"Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the [Twenty-first Amendment]." *Heald v. Engler*, 342 F.3d 517, 522 (6th Cir. 2003), *aff'd sub nom. Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161

L.Ed.2d 796 (2005). However, "as early as the 1960s, the Supreme Court signaled a break with this line of reasoning."[2] *Id.* And in 1984, the Supreme Court

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[2] The dissent summarizes the history of § 2 to support the conclusion that states have the authority to impose durational-residency requirements on owners because these requirements are regarding intrastate distribution of alcohol beverages, not the interstate flow of product. See Dissent Op. at 629–33. However, this history is less persuasive than the dissent makes it sound.

The Supreme Court already conducted an extensive historical analysis in *Granholm*, 544 U.S. at 476–87, 125 S.Ct. 1885, to reach its own interpretation of modern precedent: "[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, [the Supreme Court has] generally struck down the statute without further inquiry," id. at 487, 125 S.Ct. 1885 (emphasis added) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). Thus, contrary to the dissent's conclusion, the proper backdrop to understand the interplay between the Twenty-first Amendment and the Commerce Clause is this statement in *Granholm*—a state cannot use the Twenty-first Amendment to impede directly or indirectly on interstate commerce; even an effect on interstate commerce is invalid.

Additionally, the dissent fails to acknowledge that the Supreme Court has explicitly transitioned from its original interpretation of the Twenty-first Amendment. For instance, the Supreme Court's opinion in *Granholm*, 544 U.S. at 484–86, 125 S.Ct. 1885, abrogated *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), which the dissent does not acknowledge. In particular, the Supreme Court explicitly rejected the paragraph in *Young's Market* that the dissent quotes on page twenty-eight:

> The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation,

importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of this history and were inconsistent with this view. In *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38 (1936), for example, the Court rejected the argument that the Amendment did not authorize discrimination:

> "The plaintiffs ask us to limit this broad command [of § 2]. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court reaffirmed the States' broad powers under § 2 in a series of cases, see *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246 (1939), and unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers. T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 4, and App. I (1940) (stating in the wake of *Young's Market* that "[r]ivalries and reprisals have thus flared up").

> It is unclear whether the broad language in *Young's Market* was necessary to the result because the Court also stated that "the case [did] not present a question of discrimination prohibited by the commerce clause." 299 U.S., at 62, 57 S.Ct. 77. The Court also declined, contrary to the approach we take today, to consider the history

reiterated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), that the Commerce Clause limits a state's power under the Twenty-first Amendment. *Heald*, 342 F.3d at 523.

In *Bacchus*, the Supreme Court noted that "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." 468 U.S. at 275, 104 S.Ct. 3049. "To draw a conclusion that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Id.* (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964)). The Supreme Court stated that "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution and each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* (quoting *Hostetter*, 377 U.S. at 332, 84 S.Ct. 1293). Additionally, the Supreme

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> underlying the Twenty-first Amendment. *Id.*, at 63–64, 57 S.Ct. 77. This reluctance did not, however, reflect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquors. . . .
>
> *Granholm*, 544 U.S. at 484–86, 125 S.Ct. 1885 (alterations in original). The Supreme Court also implied that *Young's Market* is inconsistent with the Wilson Act and the Webb-Kenyon Act. *See id.* at 484–85, 125 S.Ct. 1885. Therefore, cases such as *Young's Market* are not reliable for this analysis.

Court emphasized that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276, 104 S.Ct. 3049. Because of these issues, the Supreme Court stated that a court needs to consider "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 275–76, 104 S.Ct. 3049 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)).

The Supreme Court examined Hawaii's tax exemption at the wholesale tier for okolehao, which is a root from an indigenous shrub, and pineapple wine in *Bacchus*. *Id.* at 265, 104 S.Ct. 3049. The question before the Supreme Court was "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275, 104 S.Ct. 3049. The Supreme Court noted that Hawaii did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.' " *Id.* at 276, 104 S.Ct. 3049. Thus, the Supreme Court determined that the Twenty-first Amendment did not immunize Hawaii's law "because the tax violates a central tenet of the Commerce Clause but is not

supported by any clear concern of the Twenty-first Amendment." *Id.*

In *Granholm*, the Supreme Court examined whether "a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate[s] the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment." 544 U.S. at 471, 125 S.Ct. 1885. When considering this question, the Supreme Court stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489, 125 S.Ct. 1885. And because the "instant cases" before the Supreme Court "involve[d] straightforward attempts to discriminate in favor of local producers . . . [t]he discrimination [was] contrary to the Commerce Clause and [was] not saved by the Twenty-first Amendment." *Id.* The Supreme Court also reasserted its previous recognition that "the three-tier system itself is 'unquestionably legitimate.' " *Id.* at 489, 125 S.Ct. 1885 (quoting *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)).

The interaction between *Bacchus* and *Granholm* has created some uncertainty. Does scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products? And does the Twenty-first Amendment automatically immunize a state law regarding retailers and wholesalers of alcoholic beverages? The Second, Fourth, Fifth, and Eighth Circuits have attempted to reconcile the cases. *Cooper II*, 820 F.3d at 743; *S. Wine & Spirits of Am., Inc. v. Div. of*

Alcohol & Tobacco Control, 731 F.3d 799, 809, 810 (8th Cir. 2013); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006).

For example, in *Arnold's Wines* the Second Circuit examined a state law allowing in-state licensed retailers to deliver alcoholic beverages to customers' homes but preventing out-of-state retailers from doing the same. 571 F.3d at 188. The court stated that "[t]he *Granholm* Court set forth the test for determining the constitutionality of state liquor regulations," which was that "[i]f the state measure discriminates in favor of in-state producers or products, the regulatory regime is not automatically saved by the Twenty-first Amendment simply by virtue of the special nature of the product regulated." *Id.* at 189. Additionally, the court reasoned that "[i]t is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause." *Id.* at 190. Thus, "Appellants' challenge to the ABC Law's provisions requiring all wholesalers and retailers be present in and licensed by the state . . . [was] a frontal attack on the constitutionality of the three-tier system itself." *Id.* "Appellants' argument [was] therefore directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system." *Id.* at 190–91.

In *Southern Wine*, the Eighth Circuit examined Missouri's law requiring a corporation—including its directors, officers, and super-majority of shareholders—to be residents of Missouri for three

years prior to obtaining a wholesaler-alcoholic-beverages license. 731 F.3d at 802–03. When reviewing "the current state of the relationship between the dormant Commerce Clause and the Twenty-first Amendment," the Eighth Circuit noted that, "in its most recent pronouncement on the subject, the Supreme Court simultaneously cited *Bacchus* and said that 'state policies are protected under the Twenty-first Amendment when they treat liquor produced out of the state the same as its domestic equivalent.' " *Id.* at 809 (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). "Given *Granholm*'s recency and specificity," the court decided that *Granholm* provided the "best guidance." *Id.* The Eighth Circuit concluded that "[i]f it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, then . . . States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers' directors and officers, and a supermajority of their shareholders." *Id.* at 810 (citation omitted). "Insofar as *Granholm* imported [*Bacchus*'s] balancing approach to regulations of the three-tier system, . . . it drew a bright line between the producer tier and the rest of the system." *Id.* Therefore, in the view of the Eighth Circuit, the residency requirement for alcoholic-beverages wholesalers did not violate the dormant Commerce Clause. *See id.* at 809.

Conversely, the Fifth Circuit determined that *Bacchus* is still good law. In *Cooper II*, the defendant, a Texas trade association, moved for relief from an injunction under Federal Rule of Civil Procedure 60(b) on the ground that *Granholm*

created a significant change in the law since the Fifth Circuit enjoined a state durational-residency requirement in *Cooper v. McBeath* (*Cooper I*), 11 F.3d 547 (5th Cir. 1994). *Cooper II*, 820 F.3d at 734, 742. However, the Fifth Circuit disagreed. After examining the language in *Granholm*, the Fifth Circuit held that *Granholm* did not overrule or alter *Bacchus*. *Id.* at 742. And regarding *Granholm*'s statement that "state policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent," the Fifth Circuit determined that this statement did not limit scrutiny under the Commerce Clause to producers because the statement was dicta. *Id.* at 743. Instead, the Fifth Circuit "interpreted [*Granholm*] as reaffirming the applicability of the Commerce Clause to state alcohol regulations, but to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system."[3] *Id.*

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[3] The dissent argues that the Fifth Circuit misread *Granholm* because the Fifth Circuit's test would allow a court to replace the views of the state legislature with a court's own perspective. *See* Dissent Op. at 634–35. For this argument, the dissent states that *Granholm* "gave [states] 'virtually complete control' over 'how to structure th[at] . . . system.' " *Id.* (second alteration in original) (quoting *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885).

However, the dissent skews this statement in *Granholm*. First, *Granholm* itself did not grant states complete control regarding the composition of a distribution system; instead, the Supreme Court stated that *"[t]he Twenty-first Amendment* grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the

We find the Fifth Circuit's reconciliation of *Bacchus* and *Granholm* persuasive for six reasons. First, the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*. Second, in *Granholm*, the Supreme Court reiterated *Bacchus*'s concern about the protection of economic interests across state lines, suggesting that the Twenty-first Amendment does not automatically immunize a state's alcoholic-beverages law regarding wholesalers or retailers. Third, the Supreme Court emphasized that the Twenty-first Amendment does not permit a

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liquor distribution system." *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885 (emphasis added) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). By using the word "virtually," the Supreme Court noted that there are limits to a state's power. Additionally, immediately after making this statement, the Supreme Court qualified the type of control that is acceptable: "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Id.* at 488–89, 125 S.Ct. 1885. After noting the types of restrictions that are valid, the Supreme Court declared that other "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." *Id.* at 489, 125 S.Ct. 1885. In the preceding paragraph, the Supreme Court noted that "the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake. . . . [T]he Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." *Id.* at 488, 125 S.Ct. 1885 (discussing *Bacchus*, *Brown-Forman*, and *Healy*). Thus, contrary to the dissent's argument, the Fifth Circuit's reasoning is in line with the Supreme Court's determinations in *Granholm*—the Twenty-first Amendment does not validate a state legislature's discriminatory laws.

state to discriminate on the basis of citizenship; accordingly, the flow of products across state lines is not the sole concern under the dormant Commerce Clause. Fourth, the Supreme Court again stated that the Commerce Clause limits the Twenty-first Amendment. Fifth, the Supreme Court also stated that there are times when the three-tier system is invalid. And lastly, *Granholm* did not limit its application of the Commerce Clause to alcoholic-beverages laws regarding producers.[4] Thus, *Bacchus* and *Granholm* are reconcilable.

First, the Supreme Court in *Granholm* explicitly declined to overrule *Bacchus*; therefore, the reasoning in *Bacchus* still stands:

> Recognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation. Furthermore, *Bacchus* does not stand alone in recognizing that the Twenty-first Amendment did not give States complete freedom to regulate where other constitutional principles are at stake. A retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*. These cases invalidated state liquor regulations under the Commerce Clause. Indeed, *Healy* explicitly relied on the

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[4] Even after the Supreme Court decided *Granholm*, we have continued to rely on *Bacchus*. *See Jelovsek*, 545 F.3d at 437 ("The parties, as well as the district court, spent a great deal of effort examining whether, and to what extent, *Granholm* applies to the cases before us. We believe *Bacchus* is also instructive in this case.").

> discriminatory character of the Connecticut price affirmation statute. 491 U.S., at 340–41 [109 S.Ct. 2491]. *Brown-Forman* and *Healy* lend significant support to the conclusion that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge.

Granholm, 544 U.S. at 488, 125 S.Ct. 1885. Clearly, the Supreme Court refused to overrule *Bacchus* or limit *Bacchus* to its facts.

Second, in *Granholm*, the Supreme Court focused on a general Commerce Clause principle—the prohibition of discrimination against out-of-state economic interests. The Court began by discussing this general principle: "[t]ime and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.' " *Id.* at 472, 125 S.Ct. 1885 (emphasis added) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state *economic interests* over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry."[5] *Id.* at 487, 125

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[5] The dissent seems to argue that the Commerce Clause limits only state actions regarding alcohol distribution that regulate interstate activity, not intrastate activity having an effect on interstate commerce. However, the Supreme Court's statement that "[s]tates may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses," seems to suggest otherwise.

S.Ct. 1885 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080).

Third, the Supreme Court also discussed the general principle that a state cannot bar out-of-state citizens from engaging in its economy; thus, a state's alcoholic-beverages law is not automatically valid just because it "treat[s] liquor produced out of state the same as its domestic equivalent."[6] *Id.* at 489, 125 S.Ct. 1885. The Supreme Court stated that "[t]he rule prohibiting state discrimination against

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Granholm, 544 U.S. at 472, 125 S.Ct. 1885. Additionally, the Supreme Court has stated that "[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, [the Supreme Court has] generally struck down the statute without further inquiry." *Id.* at 487, 125 S.Ct. 1885 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080). In *Brown-Forman*, the Supreme Court determined that the Twenty-first Amendment did not protect New York's law that required a distiller or agent to affirm that its alcohol prices were not lower in any other state because that law would have a negative economic effect in other states. *See Brown-Forman*, 476 U.S. at 585, 106 S.Ct. 2080. Here, because Tennessee is favoring in-state economic interests over out-of-state economic interests by preventing out-of-state citizens from engaging in Tennessee's economy for several years, Tennessee is not merely regulating the distribution of alcohol within its borders—it is dictating who can and cannot engage in its economy.

[6] The dissent also attempts to limit *Granholm*'s holding to the statement that a law is invalid only when it "treat[s] liquor *produced out of state* the same as its domestic equivalent." *See* Dissent Op. at 634 (quoting *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). However, the dissent does not acknowledge Section II.A in *Granholm*, which devotes two pages to the principle that a state cannot bar out-of-state citizens from engaging in its economy. *See Granholm*, 544 U.S. at 472–73, 125 S.Ct. 1885.

interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens." *Id.* at 472, 125 S.Ct. 1885. Laws cannot "deprive citizens of their right to have access to the markets of other States on equal terms." *Id.* at 473, 125 S.Ct. 1885. Additionally, the Supreme Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 475, 125 S.Ct. 1885. For instance, in *Granholm*, the Supreme Court stated that "New York's in-state presence requirement runs contrary to [the Supreme Court's] admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.' " *Id.* at 475, 125 S.Ct. 1885 (first quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); and then citing *Ward v. Maryland*, 12 Wall. 418, 20 L.Ed. 449 (1871)). Therefore, scrutiny under the dormant Commerce Clause is not limited to laws regarding products.

Fourth, the Supreme Court again emphasized in *Granholm* that the Commerce Clause limits a state's power under the Twenty-first Amendment. According to the Court, "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 487, 125 S.Ct. 1885 (quoting *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049). Regardless of the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce

Clause." *Id.* (first citing *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049; then citing *Brown-Forman*, 476 U.S. at 573, 106 S.Ct. 2080; and then citing *Healy v. Beer Inst.*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)). Therefore, in *Granholm*, the Supreme Court continued to recognize that the Commerce Clause does limit the Twenty-first Amendment.

Fifth, a state's alcoholic-beverages law is not immune simply because it is part of a three-tier system. In *Granholm*, New York and Michigan "argue[d] that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system." *Id.* at 488, 125 S.Ct. 1885. But the Supreme Court disagreed, noting that, although three-tier systems are "unquestionably legitimate," those systems are not valid when they "involve straightforward attempts to discriminate in favor of local producers." *Id.* at 488, 489, 125 S.Ct. 1885. Based on this language, a state's alcoholic–beverages law is not automatically valid simply because it addresses a portion of a three-tier system.[7]

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[7] The dissent asserts that the Supreme Court "never purported to overrule its prior statements and holdings approving state authority over alcohol *distribution* as opposed to *production*." Dissent Op. at 636. And, according to the dissent, "[u]ntil the Supreme Court says so, we may not assume that the Twenty-first Amendment no longer 'create[s] an exception to the normal operation of the Commerce Clause.' " *Id.* (second alteration in original) (quoting *Capital Cities*, 467 U.S. at 712, 104 S.Ct. 2694).

But the Supreme Court has said so. In fact, it catego.ized its modern precedent into three distinct categories: (1) the Twenty-first Amendment does not protect state laws that violate other

parts of the Constitution, (2) the Twenty-first Amendment does not eliminate Congress' Commerce Clause power over alcoholic beverages, *i.e.*, "products," and (3) the Commerce Clause limits state regulation of alcohol, *i.e.*, distribution. *See Granholm*, 544 U.S. at 486–87, 125 S.Ct. 1885. The language that the Supreme Court uses to describe these boundaries is particularly compelling:

> The modern § 2 cases fall into three categories.
>
> First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, ***44 Liquormart, Inc. v. Rhode Island***, 517 U.S. 484 [116 S.Ct. 1495, 134 L.Ed.2d 711] (1996); the Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 [103 S.Ct. 505, 74 L.Ed.2d 297] (1982); the Equal Protection Clause, [*Craig v. Boren*, 429 U.S. 190, 204–09, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)]; the Due Process Clause, *Wisconsin v. Constantineau*, 400 U.S. 433 [91 S.Ct. 507, 27 L.Ed.2d 515] (1971); and the Import–Export Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 [84 S.Ct. 1247, 12 L.Ed.2d 362] (1964).
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> Second, the Court has held that § 2 does not abrogate Congress' Commerce Clause powers *with regard to liquor*. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 [104 S.Ct. 2694, 81 L.Ed.2d 580] (1984); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980). The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected. *Hostetter*, 377 U.S., at 331–332 [84 S.Ct. 1293]. Though the Court's language in *Hostetter* may have come uncommonly close to hyperbole in describing this argument as "an absurd oversimplification," "patently bizarre," and "demonstrably incorrect," *ibid.*, the basic point was sound.
>
> Finally, and most relevant to the issue at hand, the Court has held that *state regulation of alcohol is limited* by the nondiscrimination principle of the Commerce Clause. *Bacchus*, 468 U.S., at 276 [104 S.Ct. 3049]; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S.

And lastly, the Supreme Court did not state that the Commerce Clause applies only to alcoholic-beverages laws regarding producers. The statement that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent" must be read in its context. *Id.* at 489, 125 S.Ct. 1885. The Supreme Court wrote the full paragraph as follows:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, at 110 [100 S.Ct. 937]. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state run outlets or funnel

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573 [106 S.Ct. 2080, 90 L.Ed.2d 552] (1986); *Healy v. Beer Institute*, 491 U.S. 324 [109 S.Ct. 2491, 105 L.Ed.2d 275] (1989). "When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, we have generally struck down the statute without further inquiry." *Brown-Forman, supra*, at 579 [106 S.Ct. 2080].

Id. (emphasis added). Therefore, the Supreme Court has stated that the Commerce Clause applies to the production of alcoholic beverages and their distribution.

> sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S., at 432 [110 S.Ct. 1986]. See also *id.*, at 447 [110 S.Ct. 1986] (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). ***State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.*** The instant cases, in contrast, involve straightforward attempts to ***discriminate in favor of local producers.*** The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Id. at 488–89, 125 S.Ct. 1885 (emphasis added). A fair reading of this passage leads to one conclusion: the Supreme Court discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of "producers" simply because *Granholm* involved statutes addressing that step in the three-tier system. The Supreme Court did not give any indication that the Twenty-first Amendment automatically protects laws regarding wholesalers and retailers.

In summary, based on the language in *Granholm*, the Supreme Court's reasoning in *Bacchus* continues to apply along with *Granholm* itself. Therefore, we now examine Tennessee's durational-residency requirements in light of *Granholm* and *Bacchus*.

2. Tennessee's Interests in the Durational-Residency Requirements Are Not So Closely Related to the Powers Reserved by the Twenty-first Amendment

To determine whether the Twenty-first Amendment immunizes a state's alcoholic-beverages law from scrutiny under the dormant Commerce Clause, a court needs to examine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Bacchus*, 468 U.S. at 275–76, 104 S.Ct. 3049 (quoting *Capital Cities*, 467 U.S. at 714, 104 S.Ct. 2694).

In *Cooper I*, the Fifth Circuit examined a Texas law that required an applicant for a mixed-beverage permit to be a Texas resident for one year before submitting an application. 11 F.3d at 549, 550. The law also had a section that "include[d] what is commonly known as the '51 percent rule,' which forbids the issuance of a permit to any corporation 'unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of three years.' " *Id.* at 549. When examining the state's interest in these residency restrictions, the Fifth Circuit stated that "the state's interest in facilitating background checks of permit applicants by discriminating against nonresidents is not within the 'core concerns' of the Twenty-first Amendment." *Id.* at 555 (comparing *North Dakota*, 495 U.S. 423, 110 S.Ct. 1986). The Fifth Circuit emphasized that "[t]he

statutory barrier Texas has erected against nonresidents who wish to obtain mixed beverage permits results in shielding the State's operators from the rigors of outside competition." *Id.* Therefore, it determined that "[t]he discriminatory . . . residency requirement inherent in the challenged statutory provisions cannot stand." *Id.* at 555–56.

Then, in *Cooper II*, the Fifth Circuit bolstered its reasoning in *Cooper I* and stated that *Bacchus*'s reasoning still stands:

> In *Wine Country* [*Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010)], we interpreted [*Granholm*] as reaffirming the applicability of the Commerce Clause to state alcohol regulations, but to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system. *Id.* at 820–21. State regulations of the producer tier "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." [*Granholm*], 544 U.S. at 489, 125 S.Ct. 1885. But state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor.
>
> Because of the Twenty-first Amendment, states may impose a physical-residency requirement on retailers and wholesalers of alcoholic beverages despite the fact that the residency requirements favor in-state over out-of-state businesses. *Wine Country*, 612 F.3d at

> 821. The Twenty-first Amendment does not, however, authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers. *Id.* (citing *Cooper* [*I*], 11 F.3d at 555). Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system. *See id.* at 818.

820 F.3d at 743 (footnote omitted). In this language, the Fifth Circuit created an important distinction: requiring retailer-or wholesaler-alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners.[8]

Here, Tennessee's durational-residency requirements are nearly identical to the requirements in *Cooper I*. In Tennessee, to obtain a retail-alcoholic-beverages permit, individuals,

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[8] The dissent asserts that in-state distribution regulations are always discriminatory in some manner, and in some ways, the dissent is correct that "[w]hat matters is what type of discrimination is *permissible*." Dissent Op. at 634. However, the Fifth Circuit has acknowledged this dilemma, and it rectified the issue—requiring wholesalers and retailers to be in the state is permissible, but requiring owners to reside within the state for a certain period is not. *See Cooper II*, 820 F.3d at 743. Additionally, the dissent argues that *Jelovsek* has not answered this question, *see* Dissent Op. at 633–35, which is contrary to *Jelovsek*'s statement that the two-year durational-residency requirement "impermissibly favor[s] Tennessee interests at the expense of interstate commerce." *Jelovsek*, 545 F.3d at 438.

corporations, firms, directors, officers, and stockholders all need to reside within the state for two years. *See* Tenn. Code Ann. § 57-3-204(b). And although requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system, *see Cooper II*, 820 F.3d at 743, imposing durational-residency requirements is not inherent—a three-tier system can still function without these restrictions.

Tennessee's durational-residency requirements do not relate to the flow of alcoholic beverages within the state. Instead, they regulate the flow of individuals who can and cannot engage in economic activities. The Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business, but it does not give a state the power to dictate where individuals live, because a state's alcoholic-beverages laws "cannot deprive citizens of their right to have access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473, 125 S.Ct. 1885. "The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049. Therefore, the Twenty-first Amendment does not immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause.

B. Tennessee's Durational-Residency Requirements Violate the Dormant Commerce Clause

Under the Commerce Clause, Congress can "regulate Commerce . . . among the several States."

U.S. Const. art. I, § 8, cl. 3. While the Commerce Clause gives Congress authority to regulate interstate commerce, the converse is that states cannot impede Congress's power by "unjustifiably . . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." *Or. Waste*, 511 U.S. at 98, 114 S.Ct. 1345. This dormant Commerce Clause prevents "economic protectionism"—*e.g.*, a state protecting in-state economic interests by burdening out-of-state economic interests. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013) (quoting *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)). The dormant Commerce Clause helps to "effectuate[ ] the Framers' purpose to 'prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole.' " *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330–31, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)).

"To determine whether a statute violates the Commerce Clause, [we] must first determine whether the statute discriminates against interstate commerce, either by discriminating on its face, by having a discriminatory purpose, or by discriminating in practical effect." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431–32 (6th Cir. 2008) (citing *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 540 (6th Cir. 1997)). "If the statute is discriminatory, . . . it is virtually per se invalid, unless the state can demonstrate that it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'

" *Id.* at 432 (quoting *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). In contrast, a nondiscriminatory statute is presumed valid "unless the burdens on interstate commerce are 'clearly excessive in relation to the putative local benefits.' " *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

Because Tennessee's durational-residency requirements are facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means, we hold that § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) are unconstitutional.

1. The Durational-Residency Requirements Are Facially Discriminatory

In *Jelovsek*, we examined § 57-3-207(d) of Tennessee Code Annotated, which "require[d] a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents." 545 F.3d at 438. When reviewing this language, we found that the provision was "discriminatory on [its] face, and in [its] purpose." *Id.* This "provision[ ] impermissibly favor[ed] Tennessee interests at the expense of interstate commerce." *Id.*

The statutory language presently before us is very similar to the statutory language that we already examined in *Jelovsek*; the relevant statute here provides the following:

> No retail license under this section may be issued to any individual: . . . Who has not been a bona fide resident of this state during the two-

> year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

Tenn. Code Ann. § 57-3-204(b)(2)(A). And the statute here imposes similar requirements on corporations:

> (A) No retail license shall be issued to any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;
>
> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;
>
> . . . .
>
> (D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

Id. § 57-3-204(b)(3)(A)–(B), (D). Because the statute contains these durational-residency requirements, it prevents out-of-state residents from obtaining retail licenses and protects in-state residents who are retailers.[9] Therefore, we hold that § 57-3204(b)(2)(A), (3)(A)–(B), and (3)(D) are facially discriminatory.

2. Tennessee Could Achieve Its Goals with a Reasonable, Nondiscriminatory Alternative

Tennessee has provided purposes in the statute for imposing oversight of alcoholic beverages; the statute states the following:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or

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[9] Because *Jelovsek* dealt with wine production, the dissent argues that *Jelovsek* does not dictate the outcome here. *See* Dissent Op. at 633–35. Nevertheless, the language in *Jelovsek* suggests otherwise. In *Jelovsek*, this court stated that "*[o]ther provisions* of the Grape and Wine Law are discriminatory on their face, and in their purpose. For example, the Grape and Wine Law requires a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents." *Jelovsek*, 545 F.3d at 438 (emphasis added). Although the surrounding language does discuss the portions of the statute addressing wine production, in the sentence actually examining the durational-residency requirement, this court did not use the words "product" or "producers." *See id.* Thus, this court declared that a two-year residency requirement is invalid in a statement separate and apart from any portion of the opinion addressing wine production; unlike the dissent, we cannot shrug off this holding of *Jelovsek*.

> beer, . . . it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Id. § 57-3-204(b)(4). This language asserts two legitimate purposes for the residency restrictions on retailers: (1) protecting "the health, safety and welfare" of Tennessee's citizens and (2) using a higher level of oversight and control over liquor retailers. *See North Dakota*, 495 U.S. at 432, 110 S.Ct. 1986 (identifying "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue").

However, neither Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. And at oral argument, Fine Wines described several alternative means: requiring (1) a retailer's general manager to be a resident of the state, (2) both in-state and out-of-state retailers to post a substantial bond to receive a license, and (3) public meetings regarding the issuance of a license. Arguably, Tennessee can achieve its goals through nondiscriminatory means. For instance, it could implement technological

improvements, such as creating an electronic database to monitor liquor retailers. But neither Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. Therefore, Byrd and the Association have not met their burden.

In summary, the durational-residency requirements in § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) are unconstitutional because (1) they are facially discriminatory and (2) neither Byrd nor the Association has shown that a nondiscriminatory alternative cannot achieve Tennessee's goals.

C. We Sever § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) from the Rest of the Statute

"[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by (1) "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force" or (2) "sever[ing] its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). "Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.' " *Id.* at 329, 126 S.Ct. 961 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). However, we must be "mindful that our constitutional mandate and institutional competence are limited," and we must "restrain ourselves from 'rewriting state law to conform it to constitutional

requirements' even as we strive to salvage it." *Id.* at 329, 126 S.Ct. 961 (quoting *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). We also must remember that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " *Id.* at 330, 126 S.Ct. 961 (quoting *Califano v. Westcott*, 443 U. S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979)).

"Whether a portion of a state's statute is severable is determined by the law of that state." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 371 (6th Cir. 2006). In Tennessee, "[t]he doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994). The Tennessee Supreme Court has stated the following regarding the doctrine:

> The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such

> conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional.

Id. at 830 (quoting *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985)). Tennessee's general assembly has also provided a general severability statute, which states the following:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be excinded if the code would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

Tenn. Code Ann. § 1-3-110. Although this statute "does not automatically make [the doctrine of elision]

applicable to every situation[,] . . . when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted, then elision of the unconstitutional portion is appropriate." *State v. Crank*, 468 S.W.3d 15, 29 (Tenn. 2015) (quoting *In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999)).

Applying Tennessee's doctrine of elision, we hold that we can sever § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) from the rest of the statute. In the statute, in addition to protecting Tennessee citizens by imposing residency requirements, the legislature also stated that Tennessee wanted "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises."[10] Tenn. Code

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[10] By arguing that drunk driving, domestic abuse, and underage drinking are important interests, the dissent concludes that the durational-residency requirements would promote health, safety, and welfare. Dissent Op. at 633. However, in *Granholm*, the Supreme Court did not credit such blanket assertions. *See Granholm*, 544 U.S. at 489–93, 125 S.Ct. 1885 (stating that "Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods" and that "the States provide[d] little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries" to prevent underage drinking and tax evasion). In fact, even in the Supreme Court cases that the dissent cites for support, the Supreme Court required some type of evidentiary showing. *See North Dakota*, 495 U.S. at 433 & n.5, 110 S.Ct. 1986 (relying on an affidavit to conclude that "[t]he risk of diversion into the retail market and disruption of the liquor distribution system is thus both substantial and real."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (stating "that demand, and hence consumption throughout the market,

Ann. § 57-3-204(b)(4). Review of § 57-3-204 reveals that the statute contains extensive restrictions relating to this purpose. For instance, an individual cannot receive a retail license if he or she "is not twenty-one (21) years of age or older" or "has been convicted of a felony." Tenn. Code Ann. § 57-3-204(b)(2)(B), (D). Additionally, portions of the statute relate to application fees. *See* Tenn. Code Ann. § 57-3-204(b)(1). Because the statute contains various provisions that are unrelated to the durational-residency requirements and that relate to the legislature's purpose, we sever the unconstitutional durational-residency provisions, *i.e.*, § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D), from the rest of the statute.[11]

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is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance."). Therefore, these blanket assertions in the statute are not enough, and Tennessee has not provided any evidence that the durational-residency requirements will promote its alleged interests.

[11] According to the dissent, requiring 51% of stockholders to satisfy the durational-residency requirements is valid, *see* Dissent Op. at 635, but the dissent fails to acknowledge that a 51% requirement impermissibly stifles interstate commerce. For instance, the Supreme Court has "struck down a New York law that imposed a higher tax on transfers of stock occurring outside the State than on transfers involving a sale within the State" because "the Commerce Clause limits the manner in which States may legitimately compete for interstate trade, for 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " *Bacchus*, 468 U.S. at 272, 104

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the

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S.Ct. 3049 (quoting *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977)). The Supreme Court has also "struck down the Illinois Business Takeover Act, which required that a takeover offer for a target company having a specified connection to Illinois be registered with the Secretary of State and mandated that such an offer was not to become effective for 20 days, during which time the offer would be subject to administrative evaluation" because "if Illinois were free to enact such legislation, others [sic] States similarly were so empowered, 'and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.' " *Healy*, 491 U.S. at 333 n.9, 109 S.Ct. 2491 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982)). Thus, because imposing durational-residency requirements on stockholders prevents shares from freely flowing throughout states, a 51 % requirement still allows a state to engage in economic protectionism.

Additionally, the dissent concludes that the ten-year requirement is the "epitome of arbitrariness" because "[T]ennessee offered no reason why a person who has resided in the State for two years is deemed local enough to begin operating a retailer in year 3, but not local enough to continue running it in year 4." Dissent Op. at 635. But, the dissent's argument also applies to the two-year requirement because, as previously discussed, Tennessee has offered no evidence to prove that the two-year requirement advances its goals. What makes two the magic number? Why is one year not enough? What about a six-month requirement? Without answers to these questions, the two-year requirement is also "the epitome of arbitrariness." Furthermore, in *Jelovsek*, 545 F.3d at 438, this court already determined that a two-year residency requirement is invalid.

dormant Commerce Clause and **SEVER** those provisions from the Tennessee statute.

SUTTON, Circuit Judge, concurring in part and dissenting in part.

Tennessee requires sellers of alcohol to have a retail license. To obtain a license, the applicant, including any officers and directors, must be "a bona fide resident of th[e] state during the two-year period immediately preceding" the application. Tenn. Code Ann. §§ 57-3-204(b)(2)(A), (b)(3)(A). The licensing requirement applies to all sales of alcohol in the State, whether the alcohol was produced in Tennessee or elsewhere. I would uphold these modest requirements, as the text of the Twenty-first Amendment, the original understanding of that provision's relationship to the Commerce Clause, modern U.S. Supreme Court precedent, and a recent Eighth Circuit decision (concerning a similar Missouri residency requirement) all support their validity. The majority viewing it differently, I respectfully dissent from this part of its decision and agree with its other conclusions.

Constitutional text. The language of the pertinent constitutional provisions supports Tennessee's right to impose this requirement. At the outset, the U.S. Constitution gave Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and impliedly prohibited States from doing the same, *see* Albert Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 485 (1941); 2 The Records of the Federal Convention of 1787, at 625 (Max Farrand ed. 1966) (James Madison grew "more & more convinced" that the regulation of commerce among the States "was in

its nature indivisible and ought to be wholly under one authority."). Whatever else this Tennessee requirement does, it does not purport to displace or contradict congressional regulation of commerce among the States. It merely announces a limited requirement for in-state sales of alcohol.

The end of Prohibition in 1933 made the States' authority over this issue more clear. In repealing the Eighteenth Amendment, the Twenty-first Amendment allowed the States to regulate alcohol as a unique commercial article. Unlike any other provision in the U.S. Constitution, it sets up what is largely a regulatory regime of one: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. Const. amend. XXI, § 2 (emphasis added). After 1933, then, a State could continue to prohibit sales of alcohol within its territory. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128 (1939). Or it could allow sales of alcohol on its own commercial terms, say by permitting only some types of alcohol to be sold within the State or by permitting sales only through state-run retailers or by permitting sales only through some other distribution system. The language of the amendment—prohibiting the "delivery or use" of alcohol "in violation of the laws" of each State—empowers States to regulate sales of alcohol within their borders. A two-year residency requirement to obtain a license to own a brick-and-mortar retail store, like a two-year residency requirement to operate a state-owned retail

store, fits within the core authority delegated to the States by the Twenty-first Amendment.

History. A few screen shots of history support this interpretation. The itinerant regulation of alcohol over time captures the itinerant relationship between the power of the National Government and the States over time. Most areas of federal and state authority, including over commerce, initially were deemed largely exclusive, as a review of the enumerated powers delegated to Congress in Article I, Section 8 suggests. If Congress had authority over a form of commerce, the States usually did not. So too in the other direction. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–89, 197–200, 6 L.Ed. 23 (1824); *id.* at 226–27 (Johnson, J., concurring); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) ("The pre-emption of state legislation would automatically follow, of course, if the grant of power to Congress to regulate interstate commerce were exclusive . . . as John Marshall at one point seemed to believe it was."). Largely exclusive spheres of authority, not largely overlapping spheres of authority, thus were the initial order of the day.

But the congressional sphere of authority grew over time, as more and more "commerce" was treated as "among the several States." Even before Prohibition in 1920, the definition of interstate commerce had come to mean that the regulation of most products, including alcohol, was increasingly a matter of state *and* federal law. *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 121–23, 10 S.Ct. 681, 34 L.Ed. 128 (1890). That helps to explain the federal laws

concerning sales of alcohol before Prohibition. Although the Supreme Court had held that the States could "regulat[e] and restrain[ ] the traffic" in liquor, including by "prohibiting it altogether," *The License Cases*, 46 U.S. (5 How.) 504, 577, 12 L.Ed. 256 (1847), it also held that they could not interfere with the liquor traffic "in the absence of congressional permission to do so," *Leisy*, 135 U.S. at 118, 124–25, 10 S.Ct. 681. Those rulings spawned a series of congressional attempts to bolster state authority. *See* Wilson Act of 1890, 27 U.S.C. § 121; Webb-Kenyon Act of 1913, 27 U.S.C. § 122. They were largely unsuccessful. One reason was that the Court held that the Commerce Clause prohibited a dry State from regulating unopened packages of alcohol—even though destined for illegal consumption in the State—because unopened packages remained articles of commerce. *Rhodes v. Iowa*, 170 U.S. 412, 426, 18 S.Ct. 664, 42 L.Ed. 1088 (1898).

This federal-state interplay also helps to explain the language of the Eighteenth Amendment, which first established that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. Const. amend. XVIII, § 1. Section 2 of the Amendment then clarified overlapping federal and state authority to enforce Prohibition: "The Congress and the several States shall have *concurrent power* to enforce this article by appropriate legislation."

With the passage of the Twenty-first Amendment, the States and Federal Government both had some regulatory power over alcohol but generally were thought to regulate it exclusively in different ways. *Compare Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394, 59 S.Ct. 254, 83 L.Ed. 243 (1939) (upholding Michigan statute prohibiting the sale of out-of-state beer against Commerce Clause challenge), *with William Jameson Co., Inc. v. Morgenthau*, 307 U.S. 171, 172–73, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) (per curiam) (upholding Federal Alcohol Administration Act's labeling requirements against Twenty-first Amendment challenge). From the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of regulatory power.

But over the next ten years, the Court's understanding of the Commerce Clause power changed. By the early 1940s, it was no longer true that regulations of commerce in the main were exclusively federal or exclusively state. The growth of the national commerce power, through the development of the "substantial effects" test, *Wickard v. Filburn*, 317 U.S. 111, 128–29, 63 S.Ct. 82, 87 L.Ed. 122 (1942), eliminated many (but not all) distinctions between intrastate and interstate commerce, making most businesses potentially subject to state *and* national regulation. The question was no longer "whether the right government was acting within the right sphere." *Am.*

Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (quoting *Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 257).

That development altered the nature of the *implied* restrictions on state authority established by the Commerce Clause. An exclusive delegation of power to one sovereign implies a ban on assertions of power by another sovereign over the same matter. Just as Congress's exclusive power to "coin Money" implied a lack of state authority to do the same, U.S. Const. art. I, § 8, cl. 5, Congress's exclusive power to regulate interstate commerce among the States implied a lack of state power in the area. *See Smith v. Turner*, 48 U.S. (7 How.) 283, 393–96, 12 L.Ed. 702 (1849) (McLean, J.); The Federalist No. 42, at 263 (James Madison) (Clinton Rossiter ed. 2003); *but see Tyler Pipe*, 483 U.S. at 261, 107 S.Ct. 2810 (Scalia, J., concurring in part and dissenting in part). Hence the need for the Court to create implied/negative/dormant Commerce Clause limitations on state authority, which was the only way to preserve the Federal Government's largely exclusive regulatory power over interstate commerce.

At their creation, the Court's dormant Commerce Clause cases were not just appropriate but necessary, as they provided the only way to keep the States on the one hand and Congress on the other in their separate and exclusive spheres of regulatory authority. But in a post-1930s world, in which the National Government and States largely have *overlapping* power over most sectors of commerce, the implementation of an implied restriction on state

authority is much more difficult to articulate and police.

Which is what makes this case interesting—and complicated. From the vantage point of the understanding of the Commerce Clause circa 1933, the case looks easy. That's why Justice Brandeis in 1936 would describe the States' authority to regulate sales of alcohol in such sweeping terms:

> The words used [in § 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38 (1936). In the Court's view at that point, the Twenty-first Amendment gave the States what looked like largely plenary commercial authority (save for violations of individual rights guarantees, such as the Fourteenth Amendment) to regulate sales of alcohol within their borders, including in ways that the Commerce Clause would not otherwise allow. *Id.*

The congressional stance on regulation of alcohol at the time suggests a similar understanding. In the

immediate aftermath of the Twenty-first Amendment's ratification, Congress overhauled Title 27 of the U.S. Code—"Intoxicating Liquors"—by repealing Chapters 1, 2, 4, 5, and 9 (dealing with production, transportation, and sale of liquor). 27 U.S.C. §§ 1–108, 221–28. Chapter 6, which includes the Wilson Act of 1890 (§ 121), Webb-Kenyon Act of 1913 (§ 122), and, many years later, the Twenty-first Amendment Enforcement Act of 2000 (§ 122a), all bolster state authority over alcohol. *See, e.g., id.* § 122a(b)–(c) (authorizing state Attorneys General to bring civil actions in federal court to enjoin "any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor"). Chapter 8, the last enclave of federal oversight, concerns things like labeling. Federal Alcohol Administration Act, 27 U.S.C. §§ 201 et seq. But it leaves "transportation [and] importation . . . for delivery or use" (i.e., distribution) to the States, U.S. Const. amend. XXI, § 2, and even incorporates state-law requirements, like Tennessee's two-year residency rule for officers and directors, *see* 27 U.S.C. §§ 204(a)(2)(C), 204(d), 208(b)(2).

At the time the Twenty-first Amendment was ratified, a State's greater authority to ban all alcohol sales in the State included a lesser authority to regulate sales of alcohol in the State with a heavy hand. *Ziffrin*, 308 U.S. at 138, 60 S.Ct. 163. Another way of putting it is this: The existence of the Commerce Clause *and* the Twenty-first Amendment makes it more difficult to imply a restriction on state authority (to regulate commerce) expressly created in another constitutional provision (to regulate retail sales of alcohol).

Modern U.S. Supreme Court precedent. The Court's more recent decisions in this area should be read against this backdrop, and are easier to follow (to my mind) in that context. Even if the meaning of the relevant constitutional provisions has migrated over the years, perhaps to account for the continued integration of domestic and international commerce, today's precedents still give the States authority to impose residency requirements on the owners of retail establishments that sell beer, wine, or liquor.

A consensus remains that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). While the size of that exception may be fickle, a few constant rules remain. On one side of the ledger, the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 343, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (invalidating price-affirmation statute regulating liquor sales in other States); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (invalidating discriminatory tax on out-of-state liquor); *Capital Cities*, 467 U.S. at 714, 104 S.Ct. 2694 (invalidating ban on TV wine ads emanating from other States); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (invalidating resale price maintenance and price posting statutes); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964) (invalidating regulation of alcohol passing through

JFK Airport that would not be used until arrival at international destination); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 533–34, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938) (invalidating state restriction on shipments to a federal enclave in its borders).

On the other side of the ledger, exceptions to the normal operation of the Commerce Clause remain alive and well in some areas—in particular the in-state nature of alcohol distribution. The States retain "virtually complete control" over "how to structure the[ir] liquor distribution system[s]." *Granholm v. Heald*, 544 U.S. 460, 488, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). All thus agree that the States retain authority (1) to ban alcohol completely, (2) to distribute liquor exclusively through state-run monopolies, or (3) to operate distribution systems, including through regulations that require retailers and wholesalers to reside in-state. *Id.* at 489, 125 S.Ct. 1885. Because liquor distribution implicates the States' core interests after the repeal of Prohibition, such regulations are generally "protected under [§ 2] when they treat liquor produced out of state the same as its domestic equivalent." *Id.* State authority in this area is "virtually" limitless, at least when it comes to the Commerce Clause. *Id.* at 488, 125 S.Ct. 1885. State regulations of in-state distribution, even if facially discriminatory, are constitutional unless a challenger can show that they serve no purpose besides "economic protectionism." *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049.

Measured by these standards and cases, Tennessee's two-year residency requirement should survive. We must start with the assumption that tiered distribution systems are "unquestionably

legitimate." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885. As part of these systems, the States may require retailers and wholesalers to reside within their borders. *See id.* And if the States may do that, they must "have flexibility to define the requisite degree of 'in-state' presence" necessary for participating as a retailer or wholesaler. *S. Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013). Tennessee's two-year residency rule and its application of that rule to a retailer's officers and directors lawfully exercise that authority.

Promoting responsible consumption and orderly liquor markets "fall within the core of [Tennessee's] power" under § 2. *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990). Retailers are critical to serving those interests. Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as "drunk driving, domestic abuse, [and] underage drinking." *S. Wine & Spirits*, 731 F.3d at 811. Tennessee reasonably concluded that requiring retailers to reside in the communities that they serve would further "health, safety and welfare." Tenn. Code Ann. § 57-3-204(b)(4). Tennessee's method for establishing in-state residency also makes sense. Requiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare. The only way to know a community is to live there, which may explain why Congress requires federal court of appeals judges to live within their circuits, 28 U.S.C. § 44(c), and

district court judges to live within their districts, *id.* § 134(b).

The same is true with respect to a residency requirement for officers and directors of the retailer. It ensures that they are familiar with the community and in a position to alter or influence the retailer's behavior based on that understanding. *See* Tenn. Code Ann. §§ 48-18-101(b), 301(b)(1), 402, 403(b)(1). The Federal Alcohol Administration Act, notably, also regulates officers and directors of liquor companies. *See, e.g.*, 27 U.S.C. § 208.

Court of appeals precedents. The post-*Granholm* circuit precedents likewise support this conclusion. Several courts agree that *Granholm* drew a line between regulation of (out-of-state) producers and regulation of (in-state) wholesalers and retailers, requiring rigorous review of the former and deferential review of the latter. *See Freeman v. Corzine*, 629 F.3d 146, 158 (3d Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *cf. Cooper v. Tex. Alcoholic Beverage Comm'n (Cooper II)*, 820 F.3d 730, 743 (5th Cir. 2016) (dormant Commerce Clause applies "to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier").

One circuit has approved requirements nearly identical to Tennessee's. In a thoughtful opinion by Judge Colloton, the Eighth Circuit upheld a three-year residency requirement in Missouri for wholesalers' officers, directors, and 60% of their stockholders. *S. Wine & Spirits*, 731 F.3d at 802–03.

We should do the same for Tennessee's two-year requirement.

Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008), does not change things. That case, it is true, invalidated a law that "requir[ed] a two-year Tennessee residency." *Id.* at 438. But the requirement applied only to wine *production*. *See* Grape and Wine Law, Tenn. Code Ann. § 57-3-207 (regulating "winer[ies]" and "farm wine producer[s]"). It thus did not "treat liquor *produced out of state* the same as its domestic equivalent." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (emphasis added). State laws that *do* treat out-of-state products the same, like Tennessee's retail residency rules, are generally "protected under the Twenty-first Amendment." *Id.*

Isn't it still true that the requirements here are "discriminatory on their face," just like the ones in *Jelovsek*? But in-state distribution regulations in one sense always discriminate against out-of-state interests, as *Granholm* illustrates. *See* 544 U.S. at 466, 489, 125 S.Ct. 1885; *id.* at 517–19, 521–22, 125 S.Ct. 1885 (Thomas, J., dissenting). At the same time, however, such regulations may serve a State's core concerns under the Twenty-first Amendment—for instance, by reducing in-state supply, increasing the price of liquor, or even regulating it in a way that increases (or limits decreases in) the price of liquor. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–05, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). It thus does not matter whether an in-state distribution regulation discriminates against out-of-state interests. What matters is what type of discrimination is *permissible*. This one is, and *Jelovsek* says nothing about that question.

The Fifth Circuit, I acknowledge, refused to enforce a residency requirement for holders of a "mixed beverage permit" and 51% of their stockholders. *Cooper II*, 820 F.3d at 734–35; *see* Tex. Alcoholic Bev. Code Ann. § 28.01. In *Cooper II*, the Texas Package Stores Association asked the court to grant relief from a twenty-five-year-old injunction that allowed a Texas strip club to retain its permit after it was acquired by owners living in Florida and Tennessee. *See* Fed. R. Civ. P. 60(b)(5). The Fifth Circuit denied relief because *Granholm* did not effect "a significant change in decisional law." *Cooper II*, 820 F.3d at 740–41.

Putting this unusual posture to the side, the Fifth Circuit appears to have misread *Granholm* when it concluded that "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of" a State's distribution system. *Id.* at 743. Because "[t]here is no archetypal three-tier system from which [to glean] the 'integral' or 'inherent' elements," the Fifth Circuit's test creates the risk that a court will unnecessarily substitute its own judgment for that of a state legislature about the best policies for regulating liquor. *S. Wine & Spirits*, 731 F.3d at 810. *Granholm* did more than authorize States to maintain some sort of liquor distribution system; it gave them "virtually complete control" over "how to structure th[at] . . . system." *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885. It matters not that one can imagine other ways a distribution system could function because "[t]here is no narrow tailoring requirement under the Twenty-first Amendment." *S. Wine & Spirits*, 731 F.3d at 812.

I agree with my colleagues, however, that two aspects of Tennessee's scheme must fall: its application of the residency requirement to 100% of a retailer's stockholders, Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D), and its imposition of a ten-year residency requirement for renewal of a license, *id.* § 57-3-204(b)(2)(A).

A requirement that every stockholder reside in Tennessee does not further the State's interest in responsible retailers. Tennessee's Business Corporations Act states that company management—directors and officers—shall exercise "[a]ll corporate powers." *Id.* §§ 48-18-101(b), 402; *see also id.* § 48-18-101(c). While stockholders still may exert influence over their agents, 51% of the stockholders—not 100%—is usually all it takes to do so. Unlike Missouri, Tennessee did not focus on closely held corporations or require a simple- or super-majority of stockholders to be residents. *See S. Wine & Spirits*, 731 F.3d at 802–03 (citing Mo. Rev. Stat. § 311.060.3). I see no way to explain this all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism.

The same goes for Tennessee's residency rule for renewal of a license. Although Tennessee grants an initial retail license after two years of in-state residence, it grants renewal of that very license only after *ten* years of residence. Tenn. Code Ann. § 57-3-204(b)(2)(A). Tennessee offered no reason why a person who has resided in the State for two years is deemed local enough to begin operating a retailer in year 3, but not local enough to continue running it in year 4. Even that might not have been a problem if

initial licenses lasted for ten years. But the retail license "expire[s] twelve (12) months following the date of its issuance." *Id.* § 57-3-213(a). That is the epitome of arbitrariness.

The court offers two key responses to my conclusion that Tennessee's two-year residency requirement for alcohol retailers does not violate the Constitution. One involves history. The court is right that *Granholm* "conducted an extensive historical analysis." *Supra* at 614 n.2. My point is that *Granholm* focused on the history in the run-up to Prohibition and concluded that, by constitutionalizing the Wilson and Webb-Kenyon Acts, the Twenty-first Amendment incorporated a pre-existing anti-discrimination principle. *See* 544 U.S. at 476–86, 125 S.Ct. 1885. That's why the Court distanced itself from the sweeping language in *Young's Market*. But that principle concerned discrimination against out-of-state *products*. *See* Wilson Act, 27 U.S.C. § 121 (making all imported liquors "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such . . . liquors had been *produced* in such State"); *Granholm*, 544 U.S. at 483–84, 125 S.Ct. 1885 ("The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor *produced* out of state."); *id.* at 486, 125 S.Ct. 1885 ("[T]he Twenty-first Amendment . . . does not displace the rule that States may not give a discriminatory preference to their own *producers*.") (emphases added). It is *that* history that was at issue in *Granholm*. Even if we can no longer read *Young's Market* for all it is worth,

the Court never purported to overrule its other decisions and holdings approving state authority over alcohol *distribution* as opposed to *production*.

The court's second response is of a piece—to focus on language from *Granholm* (in truth one sentence from *Granholm*) to suggest that traditional dormant Commerce Clause principles apply in full to liquor production *and* distribution, notwithstanding the Twenty-first Amendment. *See supra* at 614–15 n.2, 619 & n.5, 620–21 n.7 (quoting 544 U.S. at 487, 125 S.Ct. 1885). That cuts to the heart of the debate: Did *Granholm* mean to treat alcohol, including distribution of alcohol, like any other commodity when it comes to the Commerce Clause? If so, the court is right. But as I see it, the text of the Twenty-first Amendment, the history of alcohol regulation in this country, Supreme Court and circuit court precedent, and *Granholm* itself all point in the other direction. Until the Supreme Court says so, we may not assume that the Twenty-first Amendment no longer "create[s] an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712, 104 S.Ct. 2694. "An extension of this sort is not for us to make." *Arnold's Wines*, 571 F.3d at 201 (Calabresi, J., concurring).

For these reasons, I respectfully concur in part and dissent in part.

APPENDIX B

Clayton BYRD in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, et al.,

Plaintiffs,

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Defendant.

Case No. 3:16–cv–02738

United States District Court, Tennessee, Nashville Division, Nashville Division.

Signed 04/14/2017

MEMORANDUM

Judge Sharp

Pending before the Court is Plaintiff[1] Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) ("Tennessee Fine Wines")

[1] The parties in this suit are labeled as either plaintiff or defendant pursuant to this Court's Order realigning the parties. (Docket No. 53 at 1, ¶ 2).

Motion for Partial Summary Judgment, (Docket No. 55), to which Plaintiff Clayton Byrd ("Byrd") and Defendant Tennessee Wine and Spirits Retailers Association ("Association") have filed Responses in Opposition, (Docket Nos. 73, 90), and Plaintiff Tennessee Fine Wines has replied, (Docket Nos. 76, 95). For the reasons set forth below, the Court will grant Plaintiff Tennessee Fine Wines' Motion.

BACKGROUND

The relevant facts are undisputed for present purposes and are as follows:

Plaintiff Byrd is the Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"), a Tennessee state agency tasked with licensing the sale and delivery of alcoholic beverages. Plaintiff Byrd filed this action seeking a declaratory judgment regarding the constitutionality of the residency requirement for issuing a retail license outlined in Tenn. Code Ann. § 57–3–204(b)(2)(A). (Docket No. 1–1). Plaintiff Tennessee Fine Wines is a Tennessee limited liability company whose members are not residents of Tennessee. It seeks to own and operate one or more retail liquor stores, referred to as retail package stores, in Tennessee.

On July 5, 2016, Plaintiff Tennessee Fine Wines filed an application with the Commission for a new retail package store to be located in Nashville, Tennessee. Plaintiff Tennessee Fine Wines asserts that its representatives met with the Commission's staff, including Plaintiff Byrd, to discuss its plan to apply for a retail package store license prior to filing its application. It further asserts that those discussions included whether the residency

requirements would preclude it from obtaining a license. Plaintiff Byrd disputes having met with representatives of Tennessee Fine Wines prior to the submission of its application. The Commission's staff advised Plaintiff Tennessee Fine Wines that, in light of two opinions by the Tennessee Attorney General that the residency requirements are unconstitutional, the Commission has not enforced the residency requirements and has licensed nonresidents in the past. The Commission's staff recommended that the Commission approve Plaintiff Tennessee Fine Wines' application, subject to certain conditions. The Commission twice deferred its vote on Plaintiff Tennessee Fine Wines' application for a retail package store license, the last time being indefinitely until the Court resolves Plaintiff Byrd's declaratory action.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, this Court is required to grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiff Tennessee Fine Wines' Motion for Partial Summary Judgment presents pure issues of law, which are appropriate for resolution at the summary judgment stage.

LEGAL ANALYSIS

The Commission issues retail package store licenses pursuant to Tenn. Code Ann. § 57–3–204 and other statutory provisions. Tenn. Code Ann. § 57–3–204 contains residency requirements that prohibit the Commission from issuing retail package

store licenses to nonresidents. Specifically, when it comes to issuing a license to an individual, the statute provides in pertinent part that:

> No retail license under this section may be issued to any individual: Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

T.C.A.§ 57-3-204(b)(2)(A). Furthermore, with respect to corporations, the statute states, *inter alia*, that:

> The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to any corporation unless such corporation meets the following requirements:
>
> (A) No retail license shall be issued to any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;
>
> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the

> commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

T.C.A. § 57–3–204(b)(3)(A)–(B).

Plaintiff Tennessee Fine Wines argues that the residency requirements are unconstitutional because they violate the Commerce Clause as well as the Privileges and Immunities Clause of the United States Constitution. Because the relevant facts are undisputed, this case presents a strictly legal question as to whether Plaintiff Tennessee Fine Wines is entitled to summary judgment as a matter of law. It is.

I. Commerce Clause

The Commerce Clause of the U.S. Constitution both expressly grants Congress the power to regulate commerce among the several States, *see* U.S. Const. art. I, § 8, cl. 3, and implicitly limits the States' power to discriminate against interstate commerce. *See, e.g.*, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). The Commerce Clause's negative implication—also known as the dormant Commerce Clause—arises from a concern over "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Jelovsek v. Bredesen*, 545 F.3d 431, 435 (6th Cir. 2008) (citing *New Energy*, 486 U.S. at 273–74, 108 S.Ct. 1803). "[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits

the former and burdens the latter.' " *Granholm v. Heald*, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (citing *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)).

Dormant Commerce Clause challenges proceed under a two-tiered analysis. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010). Under the first tier, a court determines whether "a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369–70 (6th Cir. 2013) (internal quotation marks and citation omitted). To prevail, a plaintiff must satisfy its burden of showing that a state regulation discriminates against out-of-state interests either "(a) facially, (b) purposefully, or (c) in practical effect." *Id.* at 370 (internal quotation marks and citations omitted). "If the plaintiff satisfies its burden, then 'a discriminatory law is virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *Id.* (citation omitted). Under the second tier, if the challenged state regulation is neither extraterritorial nor discriminatory, then a court applies the Supreme Court's balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). *Id.* Under *Pike*, a court should uphold the challenged state regulation "unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local

benefits.' " *Id.* (internal quotation marks and citation omitted).

A. The residency requirements are facially discriminatory

Plaintiff Tennessee Fine Wines argues that the residency requirements are discriminatory on their face. For support, it relies on *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008). In that case, the Sixth Circuit vacated the district court's finding as to certain Tennessee laws concerning the wine industry. *Jelovsek*, 545 F.3d at 433. The Sixth Circuit held certain provisions of Tennessee's Grape and Wine Law to be "discriminatory on their face," "impermissibly favor[ing] Tennessee interests at the expense of interstate commerce." *Id.* Among those provisions was Tenn. Code Ann. § 57–3–207(d), which provided:

> No winery license shall be issued except to individuals *who are residents of the state of Tennessee and have been for at least two (2) years next preceding residents of the state*, ... A winery license may, in the discretion of the commission, be issued to a corporation *only if all of the capital stock of such corporation is owned by individuals who have been residents of Tennessee for not less than two (2) years preceding* ....

T.C.A. § 57–3–207(d) (2008) (emphasis added). Plaintiff Tennessee Fine Wines argues that, because the residency requirements for a retail package store license are nearly identical to the residency requirements for a winery license invalidated in *Jelovsek*, they are facially discriminatory and *per se*

invalid unless they advance a legitimate local purpose not adequately served by reasonable nondiscriminatory alternatives. Plaintiff Byrd and Defendant Association, however, argue that the state of Tennessee, pursuant to the Twenty-first Amendment, may impose such residency requirements.

Section 2 of the Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. However, it is axiomatic that even though the States have the right to regulate alcoholic beverages within their borders, that right is not plenary. *See Jelovsek*, 545 F.3d at 436 (citing *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885) (" '[T]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods ...."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (finding a state's liquor tax exemption for certain locally produced products violative of the Commerce Clause and stating that "[t]he central purpose of [Section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."). Because "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *Granholm*, 544 U.S. at 487, 125 S.Ct. 1885,

the Court is tasked with determining whether the residency requirements at issue run afoul of the Commerce Clause or are saved by the Twenty-first Amendment.

Plaintiff Byrd and Defendant Association contend that Tennessee's residency requirements for those seeking a retail package store license are protected under the Twenty-first Amendment because the residency requirements are simply part of the retail tier of Tennessee's three-tier regulatory scheme governing who may sell liquor within its borders.[2] (Docket No. 73 at 10; Docket No. 90 at 11–13). They rely on *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) for support.

In *Granholm*, the Supreme Court invalidated—on Commerce Clause grounds—laws in New York and Michigan that permitted in-state wineries, but restricted the ability of out-of-state wineries, to ship alcohol directly to consumers. In rejecting those States' argument that striking down their direct-shipment laws "would call into question the constitutionality of the three-tier system," the Court offered dicta[3] that Plaintiff Byrd and Defendant

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[2] Tennessee's three-tier alcohol distribution system consists of (1) manufacturers, who sell to (2) licensed distributors/wholesalers, who in turn sell to (3) licensed retailers, who in turn sell to consumers.

[3] The Court recognizes Defendant Association's argument that this Court still needs to follow Supreme Court dicta. *See Am. Civil Liberties Union of Kentucky v. McCreary Cty., Ky.*, 607 F.3d 439, 447 (6th Cir. 2010) ("Lower courts are 'obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.' ") (citation omitted).

Association find particularly meaningful. *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885. It stated, " 'The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " *Id.* (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The Court further observed that "[it has] previously recognized that the three-tier system itself is 'unquestionably legitimate.' " *Id.* at 489, 125 S.Ct. 1885 (citing *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)). The Supreme Court then stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers." *Id.* The Court ultimately held that "[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce." *Id.* at 467, 125 S.Ct. 1885.

Therefore, Plaintiff Byrd and Defendant Association argue that *Granholm* stands for the proposition that "as long as a state statute does not discriminate against nonresident *liquor producers or products* with its three-tier system, the statute is protected from Commerce Clause challenges." (Docket No. 73 at 7) (emphasis added); (*see* Docket No. 90 at 11–13). Under those circumstances, they

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However, the Court disagrees with Plaintiff Byrd's and Defendant Association's interpretation of the relevant dicta.

argue "the Commerce Clause is not implicated and no balancing under Commerce Clause jurisprudence is necessary" and "nothing in *Granholm* stands as a limitation on the State's powers under the Twenty-first Amendment." (Docket No. 73 at 11; Docket No. 90 at 13). The way in which other courts have interpreted *Granholm* supports Plaintiff Byrd's and Defendant Association's position.

In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), the Second Circuit upheld, against a Commerce Clause challenge, a New York statutory provision that permitted New York-licensed retailers, but not out-of-state retailers, to deliver liquor directly to New York residents. The Second Circuit stated, "*Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment." *Arnold's Wines*, 571 F.3d at 190. It continued, "It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause." *Id.* (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 and *Brooks v. Vassar*, 462 F.3d 341, 351–53 (4th Cir. 2006)).

Applying its understanding of *Granholm* to the New York law, the Second Circuit stated that the challenged provisions did not distinguish between liquor produced out of state and liquor produced in New York because licensed in-state retailers could ship both kinds directly to New York consumers. *Id.* Because the law "treat[ed] in-state and out-of-state liquor evenhandedly under the state's three-tier

system[, requiring both to pass through it], ... [it] complie[d] with *Granholm's* nondiscrimination principle." *Id.* The Second Circuit also stated that the challenge to the provisions "requiring all wholesalers and retailers be present in and licensed by the state... is a frontal attack on the constitutionality of the three-tier system itself[,]" which is "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system." *Id.* at 190–91; *see Brooks*, 462 F.3d at 352 (stating that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself."). Having concluded that New York's three-tier system did not discriminate against out-of-state producers or products, the Second Circuit declined to analyze the challenged law further under the Commerce Clause. *Arnold's Wines*, 571 F.3d at 191.

In *Southern Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), the Eighth Circuit held that Missouri's residency requirement to obtain a wholesale liquor license was permissible under the Twenty-first Amendment and the dormant Commerce Clause. There, the Eighth Circuit stated that *Granholm* "drew a bright line between the producer tier and the rest of the system," and endorsed the Second Circuit's approach in *Arnold's Wines* of not analyzing further, under Commerce Clause principles, a state regulation that does not discriminate against liquor

products or producers from out-of-state.[4] *Southern Wine*, 731 F.3d at 810. It characterized *Granholm*'s guidance as follows: "The three-tier system is 'unquestionably legitimate,' ... and that system includes the 'licensed in-state wholesaler.'" *Id.* at 809 (citing *Granholm*, 544 U.S. at 489, 125S.Ct. 1885 (quoting *North Dakota*, 495 U.S. at 432, 447, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment) ("The Twenty-first Amendment...empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."))).

Applying its view of *Granholm* to the wholesaler residency requirement, the Eighth Circuit determined that it was not discriminatory towards out-of-state liquor producers or products. *Id.* at 810. The Eighth Circuit stated that the residency requirement merely defined "the extent of in-state presence required to qualify as a wholesaler in the three-tier system." *Id.* at 809–10. It further reasoned:

> If it is beyond question that States may require wholesalers to be "in-state" without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of "in-state" presence to include the in-state residence of wholesalers'

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[4] However, the Eighth Circuit still considered the interests of Missouri, albeit deferentially. *See Southern Wine*, 731 F.3d at 810–11 ("If, despite the 'protected' status promised by *Granholm*, state policies defining the three-tier system are subject to deferential scrutiny, Missouri's law passes muster.").

> directors and officers, and a super-majority of their shareholders.

Id. at 810.

Notwithstanding *Arnold's Wines* and *Southern Wine*, the Court agrees with Plaintiff Tennessee Fine Wines that Tennessee's residency requirements for the issuance of a retailer license are discriminatory on their face. *In Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n, Inc. v. Fine Wine & Spirits of N. Texas, LLC*, — U.S. ——, 137 S.Ct. 494, 196 L.Ed.2d 404 (2016), the Fifth Circuit denied relief from a permanent injunction entered in *Wilson v. McBeath*, No. CIV. A-90-CA-736, 1991 WL 540043, at *3 (W.D. Tex. June 13, 1991), *aff'd sub nom. Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), which prevented the enforcement of the Texas Alcoholic Beverage Code's residency requirement necessary to receiving a mixed beverage permit. In *Cooper v. McBeath*, the Fifth Circuit characterized the residency requirement as an "impenetrable barrier to entering the Texas liquor industry on substantially equal terms as Texans enjoy [which] discriminates against out-of-staters." 11 F.3d at 553.

This Court finds persuasive and adopts the reasoning of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Comm'n*. In that case, the Fifth Circuit affirmed the reading of *Granholm* it adopted in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010); that is, *Granholm* reaffirmed the Commerce Clause limits state alcohol regulations—to a greater extent when the regulations deal with the producer tier and to a lesser extent

when they deal with the retailer or wholesaler tier. *See Texas Alcoholic Beverage Comm'n*, 820 F.3d at 743. This Court agrees with the Fifth Circuit that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." *Id.*

Although the *Granholm* Court stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent[,]" 544 U.S. at 489, 125 S.Ct. 1885, it is unnecessary to infer from that language that the Commerce Clause does not apply to all state regulations concerning the retailer and wholesaler tiers. This is because *Granholm* concerned a regulation that affected the producer-tier of the three-tier distribution system, so it makes sense that the *Granholm* Court discussed the protections of the Twenty-first Amendment in relation to liquor producers and products. Furthermore, *Granholm* affirmed Commerce Clause principles that apply to the treatment of people and things beyond liquor producers and products. *See Granholm*, 544 U.S. at 472, 125 S.Ct. 1885 (quoting *Oregon Waste*, 511 U.S. at 99, 114 S.Ct. 1345) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.' ") (emphasis added). That *Granholm* affirmed the legitimacy of the three-tier system does not imply that a regulation, such as the retailer residency

requirements at issue, is immune from Commerce Clause challenge.[5]

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[5] This Court disagrees with Defendant Association's argument that Plaintiff Tennessee Fine Wines "pay[s] no heed to the Court's established distinction between laws that discriminate against out-of-state producers and their products versus laws that regulate the liquor distribution system within the State after those products have arrived." (Docket No. 90 at 9). Defendant Association summarizes the Supreme Court's dormant Commerce Clause and Twenty-first Amendment jurisprudence, but none of it requires a different outcome than the one this Court reaches, especially when the *Granholm* majority discussed many of the cases Defendant Association points out and still concludes that the Commerce Clause's nondiscrimination principle limits state regulation of alcohol. Defendant Association casts doubt, by highlighting portions from the *Granholm* dissent, on what it calls "the [Granholm] majority's exception of producers from the effect of the Twenty-first amendment," which "exception," it argues, does not help Plaintiff Tennessee Fine Wines for reasons already discussed. (Docket No. 90 at 13). The *Granholm* dissent asserted that the *Granholm* majority conceded that schemes, such as private licensing schemes requiring in-state residency or physical presence, are "within the ambit of the Twenty-first Amendment." *Granholm*, 544 U.S. at 518, 125 S.Ct. 1885 (Thomas, J., dissenting). The dissent further stated that "allowing a State to require all wholesalers and retailers to be in-state companies is a core concern of the Twenty-first Amendment." *Id.* at 524, 125 S.Ct. 1885 (Thomas, J., dissenting). However, the *Granholm* dissent seems to have overstated what the majority conceded. Affirming that a state can require liquor to pass through an in-state wholesaler, as the *Granholm* majority did in dicta, is different from explicitly holding that the Twenty-first Amendment protects in-state durational residency requirements. Furthermore, as will be discussed, this Court finds there is a difference between an *in-state physical presence* requirement and a *durational residency* requirement, such as the residency requirements at issue here.

Granholm thus understood, this Court finds the residency requirements discriminatory on their face. The Court agrees that "[t]he Twenty-first Amendment does not ... authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers." *Texas Alcoholic Beverage Comm'n*, 820 F.3d at 743 (emphasis in original) (citing *Wine Country*, 612 F.3d at 821) (noting the difference between a permissible physical-residency requirement on retailers and wholesalers and an impermissible durational-residency requirement on the owners of retailers and wholesalers).[6] "Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." *Id.* (citing *Wine Country*, 612 F.3d at 818). Although requiring liquor stores to be physically present in Tennessee may serve its interest in regulating alcohol, the Court fails to see how imposing a durational residency requirement serves the same. Therefore, the Court finds that durational-residency requirements, such as those at issue here, are not inherent to a legitimate three-tier system.

The two-year (for an initial retailer license) and ten-year (for a renewal retailer license) residency requirements applicable to both individuals and corporations are discriminatory because they discriminate against out-of-staters by creating a barrier to entering the Tennessee retail liquor

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[6] This Court disagrees with Defendant Association's contention that these Fifth Circuit decisions "actually reveal inconsistency by the Fifth Circuit in attempting to follow *Granholm*." (Docket No. 90 at 16).

market. It is unavailing for Plaintiff Byrd to argue that the residency requirements apply even-handedly to every retailer seeking a license, whether in state or out, and that "applicants who are already Tennessee residents may not meet the two-year requirement along with their out-of-state counterparts." (Docket No. 73 at 10). Even though the latter may be factually true, that argument is unconvincing because it is still the case that a barrier is created for out-of-staters; pursuant to the residency requirements, nonresidents of Tennessee will always be unable to obtain a retail liquor license, but Tennessee residents of a certain duration may obtain one. Thus, the residency requirements "impermissibly favor Tennessee interests at the expense of interstate commerce." *Jelovsek*, 545 F.3d at 433; *see also Granholm*, 544 U.S. at 473, 125 S.Ct. 1885 (stating that laws violate Commerce Clause principles when "[t]hey deprive citizens of their right to have access to the markets of other States on equal terms").

Furthermore, Plaintiff Byrd's and Defendant Association's attempt to distinguish the Sixth Circuit's decision in *Jelovsek* from the facts of this case is not helpful to their position. Plaintiff Byrd and Defendant Association argue that the residency requirement found discriminatory in *Jelovsek* applied to wine producers, and, therefore, "discriminated against out-of-state wine producers in ways that gave Tennessee wineries a competitive advantage" and "implicated interstate commerce." (Docket No. 73 at 11; Docket No. 90 at 16). Plaintiff Byrd contends that, unlike the residency requirements in *Jelovsek*, the retailer residency requirements at issue do not

give in-state producers or products a competitive advantage. (Docket No. 73 at 11). Plaintiff Byrd argues that the residency requirements are protected by the three-tier system and "are firmly rooted in the regulation of who may be a retailer to sell products within Tennessee, regardless of whether the source of the liquor is in-state or out-of-state." (*Id.* at 12). He further contends that "[t]he residency requirement does nothing to inhibit the free flow of out-of-state liquor to those who meet the requirements of licensed wholesalers and retailers, who are free to sell both in-state and out-of-state liquor products directly to the general public." (*Id.* at 10–11).

It is clear that Plaintiff Byrd and Defendant Association base their arguments on a reading of *Granholm* that, per the discussion above, this Court rejects. Additionally, nothing in *Jelovsek* suggests that the Sixth Circuit interprets *Granholm* to mean that a statutory provision dealing with the retailer-tier is automatically protected from Commerce Clause challenge as long as it does not discriminate against out-of-state liquor producers or products. Even though the Sixth Circuit in *Jelovsek* states that "Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds[,]" 545 F.3d at 436 (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885), it is not obvious that the Sixth Circuit would uphold a residency requirement affecting retailers on that basis.[7]

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[7] Furthermore, the Sixth Circuit mentions Tennessee's three-tier distribution system in the context of affirming the district court's determination that Tennessee may ban entirely direct

Furthermore, the Court disagrees with Plaintiff Byrd that the residency requirement for a winery license found to be discriminatory in *Jelovsek* "made exceptions to Tennessee's three-tier system, much like the Michigan and New York statutes invalidated in *Granholm*[.]" (Docket No. 73 at 11). A court could appropriately characterize the statutory provisions invalidated in *Granholm* as exceptions to the three-tier distribution system because in-state wineries were allowed to ship directly to consumers, avoiding going through the wholesaler and retailer tiers, while out-of-state wineries could not do the same. The discriminatory winery residency requirement at issue in *Jelovsek* was not such an exception. Therefore, it is unavailing for Plaintiff Byrd to try to distinguish the retailer residency requirements at issue here from the discriminatory winery residency requirement at issue in *Jelovsek* on the basis that the former is not an impermissible exception from the three-tier system while the latter was.

B. **The residency requirements do not advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives**

Having found the retailer residency requirements discriminatory, the Court now considers whether they survive Plaintiff Tennessee Fine Wines' dormant Commerce Clause challenge because they "advance[ ] a legitimate local purpose that cannot be adequately

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shipment of alcoholic beverages to consumers because the ban "applied equally to in-state and out-of-state wineries." *Jelovsek*, 545 F.3d at 436.

served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (citation omitted). "The burden is on the State to show that the ***discrimination*** is demonstrably justified." *Id.* at 492, 125 S.Ct. 1885 (internal quotation marks and citation omitted) (emphasis in original). This standard is exacting. *See id.* at 492–93, 125 S.Ct. 1885 ("The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.").

The General Assembly stated its purposes for enacting the residency requirements as follows:

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57–5–101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that

> the laws, rules and regulations governing such licensees are observed.

T.C.A. § 57–3–204(b)(4). Because Plaintiff Byrd argues that Tennessee's residency requirements are not subject to Commerce Clause challenge, he does not offer the Court any concrete evidence to show that the discrimination against out-of-state residents is demonstrably justified. Plaintiff Tennessee Fine Wines contends that the General Assembly's stated purposes do not suffice to save the residency requirements. This Court agrees.

Stating that "it is in the best interest of the health, safety, and welfare of [the] state" to impose retailer residency requirements does not prevent the residency requirements from violating the Commerce Clause. Tennessee's concern for its health, safety, and welfare is an appropriate reason for it to regulate alcohol in general and maintain a three-tiered distribution system. *See North Dakota v. United States*, 495 U.S. at 432, 110 S.Ct. 1986 ("The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 276, 104 S.Ct. 3049 (stating that a clear concern of the Twenty-first Amendment is to "combat the perceived evils of an unrestricted traffic in liquor"). However, that concern does not explain Tennessee's restriction on out-of-staters seeking a retail liquor license. Moreover, even if the retailer residency requirements advance the health, safety, and welfare of Tennessee,

there has been no attempt to show that nondiscriminatory means would fail to accomplish Tennessee's purposes. *See Anheuser–Busch, Inc. v. Schnorf*, 738 F.Supp.2d 793, 810–11 (N.D. Ill. 2010) ("Although Defendants have come forward with acceptable reasons why alcohol regulations in general and the three-tier system are valid . . . , none of those reasons justifies the discrimination . . . ").

Likewise, aiming "to maintain a higher degree of oversight, control, and accountability" of liquor retailers because products sold through them contain a high alcohol content does not stop the retailer residency requirements from running afoul of the Commerce Clause. The Supreme Court in *Granholm* rejected greater regulatory control as a sufficient justification when reasonable nondiscriminatory alternatives could serve that purpose. There, because the states provided little supporting evidence, the Supreme Court rejected the argument that the discriminatory statutes at issue aided them "to police underage drinking." *Granholm*, 544 U.S. at 490, 125 S.Ct. 1885 ("Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions."). Furthermore, the *Granholm* Court rejected the argument that allowing in-state producers, but forbidding out-of-state producers, to ship wine directly to consumers was justified because the states "ha[d] greater regulatory control over in-state producers than over out-of-state wineries." *Id.* The Court noted that alternative means existed. *See id.* at 490–91, 125 S.Ct. 1885 ("[T]he States can take less restrictive steps to

minimize the risk that minors will order wine by mail.").

Here, this Court fails to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises. The Court has no evidence before it to allow it to infer that a prospective applicant for a retail package store license is subject to alcohol regulations during the two-year in-state residency period currently required for retailer license eligibility. Therefore, the Court cannot find that the retailer residency requirements help Tennessee to achieve greater oversight, control, and accountability. And as *Granholm* noted, "improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." *Id.* at 492, 125 S.Ct. 1885. This applies equally to out-of-staters seeking a retail liquor license in Tennessee.

Because there has been no showing that the residency requirements advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, the Court finds that the residency requirements do not survive a Commerce Clause challenge.

II. Privileges and Immunities

Given that the Court disposes of this case on Commerce Clause grounds, the Court declines to rule on whether the residency requirements also violate

the Privileges and Immunities Clause of Art. IV, § 2 of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, Plaintiff Tennessee Fine Wines' Motion for Partial Summary Judgment, (Docket No. 55), will be granted. The Court declares the residency requirements unconstitutional under the dormant Commerce Clause and enjoins their enforcement.

An appropriate order shall be entered.